EDITOR'S NOTE

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No. - .

Supreme Court, U.S.
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In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

THE ESTATE OF WILLIAM LOEB, THE WILLIAM LOEB UNION LEADER TRUST, NACKEY S. LOEB (INDIVIDUALLY, AS EXECUTRIX OF THE ESTATE OF WILLIAM LOEB, AND AS TRUSTEE OF THE WILLIAM LOEB UNION LEADER TRUST), AND THE SECURITY BANK OF NEVADA,
PETITIONERS,

v.

RICHARD R. BERGERON,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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12 pp

Questions Presented for Review.

I. Does the Full Faith and Credit Clause of the United States Constitution require the dismissal of Bergeron's claims under either the doctrines of Mootness or Res Judicata?

II. Was abstention by the United States District Court for the District of New Hampshire proper where the plaintiff's claim was in rem in character and required the federal court to interfere with the possession of a res in the custody of a state court?

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v.

RICHARD R. BERGERON,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered on November 20, 1985.

Opinions Below.

September 17, 1982: Order, Second Judicial District Court of the State of Nevada (Appendix H at 46a).

September 29, 1982: Judgment, Second Judicial District Court of the State of Nevada (Appendix I at 49a).

January 25, 1984: Opinion, Supreme Court of the State of Nevada (Appendix J at 55a).

October 4, 1984: Order Denying Rehearing, Supreme Court of the State of Nevada (Appendix K at 60a).

October 12, 1984: Order granting petitioners' Motions to Dismiss and for Summary judgment, United States District Court for the District of New Hampshire (Appendix L at 64a).

October 12, 1984: Judgment, United States District Court for the District of New Hampshire (Appendix M at 65a).

December 11, 1984: Order clarifying reasons for granting Motions for Dismissal and for Summary Judgment (Appendix N at 66a).

February 19, 1985: Order denying Petition for Certiorari to the Supreme Court of Nevada, United States Supreme Court (Appendix O at 77a).

February 27, 1985: Order removing stay of judgment and entering judgment for petitioners, United States District Court for the District of New Hampshire (Appendix P at 78a).

November 20, 1985: Opinion (Appendix R at 80a) and Judgment (Appendix Q at 79a) affirming in part and reversing in part, United States Court of Appeals for the First Circuit.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory and Constitutional Provisions.

NEVADA REVISED STATUTES:

147.040. Filing of claims: Must be filed within 90 days.

1. All persons having claims against the deceased must, within 90 days after the first publication of the notice specified in NRS 147.010, file the same, with the necessary vouchers, with the clerk of the court, who shall file and register each claim.

UNITED STATES CONSTITUTION, ARTICLE III, § 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, -- to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two and more States; — between a State and Citizens of another State; — between citizens of different States, — between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

UNITED STATES CONSTITUTION, ARTICLE IV, § 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. § 1738:

State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 2202:

Further Relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Statement of the Case.

William Loeb died in September of 1981. His will was admitted to Probate in the District Court of Washoe County, Nevada in December of 1981, and his widow, Nackey S. Loeb, was appointed as Executrix.

Plaintiff filed a creditor's claim with the Nevada Court, thereby submitting himself to its jurisdiction, alleging a right to a pro rata share of the stock of Union Leader Corporation or its cash equivalent (App. A, 1a-3a). Plaintiff knew at the time he filed his creditor's claim with the Nevada District Court, that the stock of Union Leader Corporation was not an asset of the Loeb Estate, but rather, constituted the corpus of The William Loeb Union Leader Trust. His claim sought to draw back into the decedent's estate, the stock of Union Leader Corporation.

Although the plaintiff submitted himself to the jurisdiction of the Neveda District Court, he did not first appeal the rejection of that claim within the Nevada court system wherein he had begun his quest for possession of stock of the Union Leader Corporation. Instead, he instituted a dual jurisdiction approach by filing a declaratory judgment action in the United States District Court for the District of New Hampshire, and thereafter he filed an appeal of the Neveda decision to the Nevada Supreme Court (App. B, 4a; App. J, 55a). Again, as stated by the New Hampshire federal court, ". . . [p]laintiff seeks through this action to bring back into the estate the stock which he claimed was fraudulently conveyed to the equitable owner . . ." (App. E, 35a).

Although the declaratory judgment action filed by the plaintiff in New Hampshire was styled as an action which ". . . seeks a declaration of the present right of Plaintiff . . . to receive ownership of the [Union Leader] Corporation as of William Loeb's death . . ." (App. B, 4a), it is essentially the same claim for possession of the res of The William Loeb Union Leader Trust originally filed by the plaintiff in the Nevada District Court.

Plaintiff's signed general claim, (App. A, 3a), filed in Nevada, stated:

> The deceased, William Loeb, was sole owner and shareholder of the Union Leader Corporation, incorporated and doing business in the State of New Hampshire. On numerous occasions and to induce the loyal service of myself and other employees of his company, the deceased repeatedly stated that, upon his death, ownership of the company would be divided among and devised to its then employees who were such as of his death. As of September 13, 1981, the date of Mr. Loeb's death, the undersigned

> was a full time employee of the Union Leader Corporation and entitled to receive a pro rata share of the company, or its cash equivalent, *as a creditor of the decedent's estate* . . .

(Emphasis added).

The preliminary statement of the complaint filed in the United States District Court in New Hampshire stated:

> 1. This action seeks a declaration of the present right of Plaintiff . . . to receive ownership of the Corporation as of William Loeb's death. *The Estate of William Loeb, by Nackey Loeb as Executrix, has refused to pay Plaintiff's claim for his ownership interest in the Corporation.* Rather, the issued and outstanding stock of the Union Leader Corporation, previously held by William Loeb, has been transferred to an entity known as the William Loeb Union Leader Trust, subject to a community property interest claimed by Nackey S. Loeb . . . all of which are fraudulent and unlawful attempts by Defendants to deprive Plaintiff . . . of [his] right to receive ownership of the Corporation upon William Loeb's death . . . This action further seeks a determination that William Loeb's continuous conduct, representations and offer to employees commencing in 1957 that they would receive ownership of the Corporation upon his death was a fraudulent and unlawful scheme of misrepresentation . . . The action further *seeks permanent injunctive relief against the assets or stock* of the Union Leader Corporation from being transferred or encumbered, and *an order directing specific performance* according to the terms of Loeb's cove-

> ant that ownership of the Union Leader Corporation be transferred to employees of the Corporation as of the date of his death.

(App. B, 4a-5a) (emphasis added).

The plaintiff's pretrial statement in the case under appeal alleged that the ". . . Plaintiff seeks specific performance of William Loeb's promise to bequeath stock in the Union Leader to the corporate employees . . ." (App. G, 44a).

Moreover, the Court of Appeals acknowledged that Bergeron's dismissed claim in the United States District Court for the District of New Hampshire sought declaratory and equitable relief (App. R, 82a).

Although the case below was certified as a class action, the plaintiff never perfected it as such. No notice or options were sent to class members.

Following the failure of the plaintiff to appeal the rejection of his claim for possession of Union Leader stock in the Nevada court system (state or federal) within which he had instituted litigation and after he filed the instant complaint, Nackey S. Loeb, as Executrix, filed a Petition for Declaration of Rights (App. C, 28a).

Her petition, filed on the same docket as the plaintiff's original claim and bearing the same docket number, was allowed by the Nevada District Court, which held that the plaintiff's claim was forever barred (App. H, 46a; App. I, 49a). Plaintiff appealed, continuing his dual jurisdiction approach. The Nevada Supreme Court affirmed the order of the Nevada District Court (App. J, 55a). Plaintiff filed a Petition for Rehearing with the Nevada Supreme Court which was denied (App. K, 60a).

Plaintiff next filed a petition for a writ of certiorari with the United States Supreme Court, contesting the Nevada Supreme Court's unanimous decision (App. O, 77a). Immediately after the denial of certiorari, the United States District Court for the District of New Hampshire which, at plaintiff's request, had stayed the effect of its judgment on defendants' allowed motions for summary judgment and dismissal, vacated the stay and entered the judgment which plaintiff appealed to the United States Court of Appeals for the First Circuit.

The Court of Appeals affirmed the dismissal of the plaintiff's claims against the Estate of William Loeb and Nackey S. Loeb as Executrix, but reversed the District Court's dismissal of claims against the remaining defendants.

Plaintiff did not appeal the summary judgment as to the only federal question asserted.

Argument.

I. PLAINTIFF'S CLAIM FOR STOCK OF THE UNION LEADER CORPORATION HELD BY THE WILLIAM LOEB UNION LEADER TRUST IS BARRED UNDER EITHER THE DOCTRINES OF MOOTNESS OR RES JUDICATA, BECAUSE FULL FAITH AND CREDIT MUST BE GIVEN TO THE NEVADA JUDGMENT.

The decision of the Nevada Supreme Court should be given Full Faith and Credit and be dispositive of the litigation in New Hampshire under either the doctrines of Mootness or Res Judicata. The doctrine of Mootness is applicable here, because, under the Constitution, the Declaratory Judgment Act is limited to cases that present an "actual" controversy. *Golden* v. *Zwickler*, 394 U.S. 103 (1969); *Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227 (1937); United States Constitution art. III, § 2.

> The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Maryland Casualty Company v. *Pacific Coal & Oil Company*, 312 U.S. 270, 273 (1941) (Supporting Citation omitted).

In the case at bar, the plaintiff commenced his litigation seeking possession of stock of Union Leader Corporation by filing his verified creditor's claim with the Nevada District Court in March of 1982 (App. A, 1a); *See Rauser* v. *Rauser*, 190 N.W.2d 875, 878 (Wisc. Sup. Ct. 1971). When the claim he filed with the Nevada court was rejected by the Executrix, instead of utilizing the appeal process in the Nevada court system, he attempted to use the federal Declaratory Judgment Act as a substitute for a Nevada appeal by bringing an action for declaration of rights in the New Hampshire federal court.

As a result of his failure to utilize adequate state remedies available to him after he submitted himself to the jurisdiction of that court, the plaintiff's claim for possession of stock of the Union Leader Corporation was held forever barred by the Nevada Supreme Court. *Bergeron* v. *Loeb*, 675 P.2d 397 (Nev. Sup. Ct. 1984); (App. J, 55a); *reh. den.* October 4, 1984, (App. K, 60a); *cert. den.*, February 19, 1985, (App. O, 77a). In his appeal to the Nevada Supreme Court, the plaintiff argued in essence that he properly appealed the rejection of

his claim by commencing an action in the New Hampshire federal court.

His complaint in the New Hampshire federal court, according to his argument, is based upon the proceedings he commenced in the Nevada District Court. It therefore should be dismissed as moot,

> Since the state court proceedings have terminated and final judgment has been entered, there is nothing left upon which either a writ of prohibition or a removal order could operate. No judgment rendered could affect the rights of the parties and this case is therefore moot.

Meyer v. *Lavelle*, 389 F. Supp. 972, 975 (U.S.D.C., E.D. Pa., 1975).

Meyer, a pro se plaintiff, brought a federal civil rights action against a state judge who was presiding over Meyer's state court action. While the civil rights action was pending in the federal court, Meyer lost the state court action. The district court found that as Meyer failed to appeal the state court judgment within the time limit required under Pennsylvania law, the judgment was final. Inasmuch as the state court proceedings upon which the federal civil rights action was based had been terminated and final judgment entered, the district court dismissed the federal action, finding it moot in that there was nothing left upon which any order subsequently issued could operate to affect the right of the parties.

The facts in that case are analogous to the case at bar. The plaintiff's declaratory judgment action rests upon diversity jursidiction, as it must, for the federal Declaratory Judgment Act is not an independent source of jurisdiction. *Schilling* v. *Rogers*, 363 U.S. 666, 677 (1960); *Skelly Oil Company* v.

Phillips Petroleum Company, 339 U.S. 667, 671-672 (1950); *Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227, 240 (1937). In order to implement any asserted declaration of rights, the plaintiff sought coercive relief in the form of a request for injunction and an order for specific performance (*See* 28 U.S.C. § 2202).

Here, as in *Meyer*, the state court proceedings upon which the plaintiff based his action were terminated, making this case moot, for the court below was ". . . without power to decide questions that cannot affect the rights of litigants in the case before [it] . . ." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). Thus, ". . . [b]ecause a federal decision on the merits would be an advisory opinion, federal courts would lack jurisdiction . . .." *Rogers* v. *Okin*, 738 F.2d 1, 4 (1st Cir. 1984).

This is particularly true, where as here, the state court proceedings initiated by the plaintiff are considered to be in rem in character. *Bergeron* v. *Loeb*, 675 P.2d 397, 400 (Nev. Sup. Ct. 1984) (App. J, 57a). That is, ". . . [c]onflict may arise between federal and state courts in in rem actions where the subject of the action in the federal court and also in the state court is the same res which the court must control and dispose of in order to make its relief effective . . .." 1A Part 2b J. Moore, Moore's Federal Practice ¶ 0.214 at 2358 (2nd ed. 1983).

Such a conflict exists in the case at bar, for both the general claim the plaintiff filed with the Nevada District Court and the declaratory judgment action filed below by him sought possession and control of the stock of Union Leader Corporation.

That is, the subject matter of the instant litigation is the plaintiff's claim of a right to possession of shares of stock of the Union Leader Corporation which constitute the res of The William Loeb Union Leader Trust. The plaintiff commenced the litigation regarding the subject matter by filing a general

claim for possession of stock or its cash equivalent in the Nevada District Court, a court of general jurisdiction, in March, 1982, against the Estate of William Loeb (App. A, 1a). Subsequent to the filing of that claim, the Nevada District Court took jurisdiction over The William Loeb Union Leader Trust and the res itself (App. D, 33a).

As the petitioners noted in their brief in opposition to the plaintiff's petition for certiorari filed with the United States Supreme Court, paraphrasing from p. 466 of the *Princess Lida* case:

> The oft-quoted statement from *Princess Lida of Thurn and Taxis* v. *Thompson*, 305 U.S. 456, 466 (1939), is that where the judgment is strictly in personam, both state and federal court may proceed until judgment is obtained in one of them. But if the two suits are in rem so that the court has possession or must have control of the property, to grant the relief sought, the jurisdiction of one court must yield to that of the other. The principle applicable to both federal and state courts is that the court first assuming jurisdiction over the property, may maintain and exercise that jursidiction to the exclusion of the other. The doctrine is necessary to the harmonious cooperation of federal and state tribunals . . .

There is therefore a conflict between the Nevada state court which first assumed jursidiction over the subject matter and the federal court, which initially declined to exercise jurisdiction. This conflict is critical to the exercise of jurisdiction over the subject matter because both proceedings are in rem; they demand possession and disposition of ". . . the same *res* which each court must control and dispose of in order to make its

relief effective . . . ." 1A Part 2b J. Moore, Moore's Federal Practice ¶ 0.214 at 2358 (2d ed. 1983) (emphasis in original). The object of the plaintiff's New Hampshire complaint was ". . . to wrest possession . . ." of the stock from the possession and control of the state court. *Mattei* v. *V/O Prodintorg*, 321 F.2d 180, 183 (1st Cir. 1963). Plaintiff's New Hampshire claim was not a mere claim for an interest in a fund, but rather one that sought the possession and ownership of the res — the stock. Thus, the Nevada Supreme Court held:

> [t]he assets of the Loeb estate, in which appellant claims an interest, have been and remain under the jurisdiction of the Nevada district court. *In addition, the trust, upon which appellant seeks to impose an equitable claim*, was established and is being administered under the auspices of this same court. The assets of this trust are some 3,750 shares of Union Leader Corporation stock, registered in the name of William Loeb, the decedent. The legal situs of these shares is Nevada, where the stock certificates are located and the trust is being administered. Certificates of stock are the physical representation of the stock and the court's possession of the certificates gives jurisdiction over the stock. The situs of the shares is the situs of the certificates. . . . This administration of the decedent's estate and trust is in conformity with NRS 136.010 which gives exclusive jursidiction of the settlement of estates to the district court of the county in which the deceased was a resident at the time of death. *Appellant's action in federal district court in New Hampshire essentially petitions that court to determine the ownership of*

> the trust res which is under the jurisdiction of the Nevada district court.

Bergeron v. *Loeb*, 675 P.2d 397, 401 (Nev. Sup. Ct. 1984) (App. J, 58a) (citations omitted) (emphasis added).

The Court of Appeals found on the other hand, that the doctrine of Res Judicata applied to the facts of the case at bar, but only as to the Estate and the Executrix. If the doctrine of Res Judicata is applied here, it operates as a bar to the plaintiff's entire claim, not just his claim against the Estate and the Executrix, as held by the First Circuit.

This conclusion is compelled by the nature of the claim that the plaintiff filed and the relief that he sought. He filed a creditor's claim with the Nevada District Court "as a creditor of the decedent's estate", which sought to draw back into the Estate the stock of Union Leader Corporation, which the plaintiff knew was held by The William Loeb Union Leader Trust.

Ostensibly, Bergeron's legal theory was that the decedent was the alleged wrongdoer and that his relief would have to come from the decedent's representative — the Estate. In order to effectuate his relief however, it was necessary for Bergeron to draw the assets he sought back into the estate.

By filing his claim in that manner, the plaintiff sought to impose a claim against both the Estate and the Trust, which claim has been barred by the Nevada Supreme Court. *See also Laidley* v. *Heigho*, 326 F.2d 592 (9th Cir. 1963); *Waters* v. *Harper*, 69 Nev. 315 (1952); *DeMattos* v. *McGovern*, 77 P.2d 522 (Cal. Dist. Ct. App. 1938). Therefore, ". . . a final judgment on the merits of an action *precludes the parties or their privies* from relitigating issues that were or could have been raised in that action." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980) (emphasis added).

The Court of Appeals treated the claim filed by the plaintiff with the Nevada District Court as one that he was required to file by Nevada law and limited its effect to the Estate (App. R, 81a). The Nevada statute requiring the filing of a claim against an estate with the district court is inapplicable here, because the assets which the plaintiff sought were held not by the Estate but by the Trust. Bergeron sought to impose a constructive trust upon those assets and draw them back into the Estate. Therefore, not only was the effect of Bergeron's filing of that claim much broader than that given it by the Court of Appeals, he was *not* required to do so by Nevada law. Nev. Rev. Stat. § 147.040(1) (1979).

Because Bergeron's claim was for the assets held by the Trust and he knew that when he filed his claim, the bar imposed by the Nevada Supreme Court, if given Res Judicata effect, bars the plaintiff's entire action, because by Bergeron's own legal theory, the Trust and Trustee were de facto parties, or "privies" of the Estate and Executrix. *See Allen* v. *McCurry*, 449 U.S. 90, 94 (1980).

Thus, whether the doctrines of Mootness or Res Judicata are applied, the final decision of the Nevada Supreme Court, which the United States Supreme Court has declined to review, forever bars the plaintiff's claim, for it must be given full faith and credit by all courts. (United States Constitution art. IV, § 1; 28 U.S.C. § 1738).

II. Abstention by the United States District Court for the District of New Hampshire Was Proper Where the Plaintiff's Claim Was In Rem in Character, and Required the Federal Court to Interfere with the Possession and Control of a Res in the Custody of a State Court.

The Nevada Supreme Court held that the probate proceedings in the State of Nevada were in rem in character. *Bergeron* v. *Loeb*, 675 P.2d 397, 400 (Nev. Sup. Ct. 1984) (App. J, 57a). The in rem character of the Nevada proceedings which Bergeron initiated, mandates abstention by the New Hampshire District Court for:

> "The world must move on, and those who claim an interest in persons and things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*." It is therefore within the power of the sovereign to give to its courts the authority, while settling the succession of estates . . . or administrators, to determine finally as against the world all questions which arise therein.

Tilt v. *Kelsey*, 207 U.S. 43, 56 (1907) (emphasis in original).

Abstention by the New Hampshire federal court is appropriate under the *Colorado River* doctrine, especially where, as here, the federal action is one for declaratory judgment. As the New Hampshire federal court below noted early in the litigation:

> The court also believes that the public interest will not be served by interceding in the state proceeding.

> Principles of federalism and comity long founded dictate against one sovereign interfering in the acts of another . . . Similarly, a federal court will abstain to avoid duplicating litigation already pending in state court. *Colorado River Water Cons. Dist.* v. *U.S.*, 424 U.S. 800 (1976).

(App. E, 37a).

Further, in a federal action for declaratory judgment, the remedy is discretionary, hence a court may decline to entertain it where a pending state action provided an adequate forum to determine rights. 1A Part 2, J. Moore, Moore's Federal Practice ¶ 203[4] at 2136 (2d ed. 1983).

In this context the nature of the declaratory judgment remedy should be considered. That is:

> A declaratory judgment is simply a final judicial determination, embodied in a formal declaration, of the rights and liabilities of the parties to a controversy. The characteristic which differentiates it from more traditional remedies, such as damages and injunction, is that is has no coercive effect. That is, *of itself it cannot be executed against a defendant* as can the coercive remedies.

Whitten, Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion, 53 N.C.L. Rev. 591, 616 (1975) (footnotes omitted) (emphasis added).

The Court of Appeals, however, characterized Bergeron's claim in the New Hampshire federal court as in personam in nature and suggested that the imposition of a contructive trust

upon stock held by The William Loeb Union Leader Trust would not require the New Hampshire District Court ". . . to wrest possession . . ." of the stock from the possession and control of the state court. *Mattei* v. *V/O Prodintorg*, 321 F.2d 180, 183 (1st Cir. 1963).

The position taken by the Court of Appeals ignores not only the in rem character of the Nevada proceedings which Bergeron initiated, but also the nature of the relief sought by the plaintiff and his own legal theory. Even assuming arguendo that the Court of Appeals ruled correctly in holding that only the claims against the Estate and Executrix are barred, the principles of comity cry out for the dismissal of the New Hampshire action on the basis of abstention.

That is, the plaintiff sought relief against the alleged wrongdoer, the decedent William Loeb. The assets the plaintiff sought however, were not in the decedent's Estate and the plaintiff therefore filed a claim seeking to draw those assets back into the Estate. Without the conduit through which the plaintiff sought his relief, the plaintiff cannot proceed against the Trust, for ". . . judgment cannot be obtained against the only party in whom the transferred property could be vested . . ." *Laidley* v. *Heigho*, 326 F.2d 592, 594 (9th Cir. 1963) (Supporting citations omitted); *Waters* v. *Harper*, 69 Nev. 315 (1952); *DeMattos* v *McGovern*, 77 P.2d 522 (Cal. Dist. Ct. App. 1938). This result is compelled, where as here, the proceedings are in rem in character, the Estate is closed as to Bergeron, and the Trust is as a matter of law "under the auspices" of the Nevada District Court. *Bergeron* v. *Loeb*, 675 P.2d 397, 401 (Nev. Sup. Ct. 1984) (App. J, 58a).

Further, the claim filed by Bergeron is not simply one seeking a declaration of rights. The plaintiff initiated the litigation by filing a general claim for possession of stock of Union Leader Corporation or its cash equivalent with the Nevada District Court. When his claim was rejected by the Executrix,

instead of utilizing the adequate state remedy available to him and appealing the denial of his claim within the Nevada court system, the plaintiff brought an action seeking a "declaration of rights" in the New Hampshire federal court. Yet his complaint admittedly sought possession and control of the res which is in the possession and control of the Nevada District Court.

He thus tells the Nevada courts that he filed a proper appeal to the rejection of his general claim for possession of stock of the Union Leader Corporation or its cash equivalent by filing an action in the New Hampshire federal court, yet characterizes his New Hampshire claim as one for a declaration of rights. However, recognizing that a mere declaration of rights could not operate by itself to effect any distribution of the res, because said res is in the possession and control of the state court, he sought coercive relief in the form of an injunction and an order for specific performance as a means of implementing any declaration of rights which the court below might issue. *See* 28 U.S.C. § 2202.

The New Hampshire District Court did not allow the declaratory judgment remedy to be used as a substitute for a Nevada appeal.". . . [A] declaratory judgment action cannot be used as a substitute for an appeal, nor does it provide a means whereby previous judgments rendered by state or federal courts may be re-examined . . . ." *Baier* v. *Parker*, 523 F. Supp. 288, 290 (U.S.D.C., M.D., La. 1981).

Even if his complaint were not one for declaratory judgment and was based solely on diversity jurisdiction, the court below was justified in abstaining from the exercise of jurisdiction. The United States Supreme Court has held that circumstances may permit the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration. *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 818 (1976).

> It has been held, for example, that the court first assuming jursidiction over property may exercise that jurisdiction to the exclusion of other courts. . . . In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, . . . the desirability of avoiding piecemeal litigation, . . . and the order in which jurisdiction was obtained by the concurrent forums . . .

Id. at 818 (Supporting citations omitted). See generally, 1A, Part 2, J. Moore, Moore's Federal Practice ¶ 0.203[4] (2d ed. 1983); 17 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4247 (1978).

An analysis of the facts of the case at bar in light of the *Colorado River* doctrine reveals that jursidiction over the plaintiff's claims was first acquired by the Nevada District Court when the plaintiff filed with that court his verified creditor's claim for possession of the stock or its cash equivalent. (The plaintiff has meticulously avoided mention of the filing of his claim with the Nevada District Court, saying only that he filed it with the Executrix). The Nevada courts were thus the first to assume jurisdiction over the plaintiff's claim, the assets of the Estate and the entire corpus of the Trust.

Any decision rendered by the federal court would result in piecemeal adjudication. The Nevada Supreme Court has ruled plaintiff's claims to be forever barred, and this ruling has been undisturbed by this Court's denial of certiorari. No greater disruption of the principles of comity nor waste of judicial resources could be envisioned than that which would result from any adjudication of rights by a federal court in New Hampshire, by which the Nevada courts would not be bound.

Further, although New Hampshire may appear to be a convenient forum, the decedent's assets are and have continuously been located in his Nevada domicile. The res, the object of the plaintiff's claim, is and has been located in the State of Nevada, since long before the decedent's demise. (*See* App. J, 58a). Questions of Nevada state law would necessarily arise in a New Hampshire federal court proceeding, giving rise to an additional ground for abstention or at best, a protracted series of certifications to the Nevada Supreme Court which would further delay the efficient and orderly administration of the Loeb estate.

It is significant that by his failure to appeal the order granting summary judgment on the plaintiff's federal securities claim, the plaintiff has admitted that he did not have a basis for federal question jurisdiction in any federal court. Thus, in this case, there is no federal question which might make abstention less appropriate. *Construction Aggregates Corp.* v. *Rivera de Vicenty*, 573 F.2d 86, 92 (1st Cir. 1978).

Abstention by the United States District Court for the District of New Hampshire was also appropriate under the doctrine enunciated in *Burford* v. *Sun Oil Company*, 319 U.S 315 (1943). Citing *Burford*, the District Court below held that the exercise of federal review in the case at bar would ". . . disrupt the Nevada efforts to establish a coherent public policy on the definition of a 'proper court' for filing probate claims . . ." (App. N, 70a).

The administration of estates and trusts is an area which has been generally recogized as one not properly a subject for review in the federal courts. *Markham* v. *Allen*, 326 U.S. 490 (1946); *Byers* v. *McAuley*, 149 U.S. 608 (1893). One can imagine no greater problem for the administration of the assets of a decedent than to have claims against them pending in other states unfamiliar with the laws in the decedent's state of domicile regarding such affairs. Where as here, the nature of

the proceedings which plaintiff commenced in Nevada is in rem and the Nevada state courts have been given the authority ". . . to determine finally as against the world all questions which arise therein . . ." abstention under the *Burford* doctrine is justified. *Tilt* v. *Kelsey*, 207 U.S. 43, 56 (1907).

It is significant that the question of whether the plaintiff might have filed suit in the United States District Court for the District of Nevada, rather than in New Hampshire, was not raised as an issue in this case. *Bergeron* v. *Loeb*, 675 P.2d 397, 401 (Nev. Sup. Ct. 1984) (App. J, 59a). The real issue in this case is not whether the plaintiff's so-called right to a federal forum has been denied him, but rather, whether the strong state policy of the State of Nevada which favors the efficient and expeditious administration of estates should be required to yield under the circumstances of this case to the plaintiff's desire to litigate claims against the decedent's assets in a forum other than the Nevada state or federal courts.

If the facts of this case are analyzed in light of both the *Colorado River* and *Burford* doctrines, abstention is made ever more compelling, for the world must move on and considerations of comity, judicial economy and piecemeal adjudication combined with the protection from disruption of important state concerns more than justifies the ". . . decision of the district court to decline jurisdiction . . ." *Construction Aggregates Corp.* v. *Rivera de Vicenty*, 573 F.2d 86 at 92 (1st Cir. 1978).

Conclusion.

The United States Supreme Court should allow the foregoing petition for certiorari and reinstate the decision of the United States District Court for the District of New Hampshire, which properly dismissed all of the plaintiff's claims.

Respectfully submitted,

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On the Brief:

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Appendix A.

In the Second Judicial District Court

Of the State of Nevada, in and for the County of Washoe.

No. 81-10236 Dept. No. _____

IN THE MATTER OF THE ESTATE OF

WILLIAM LOEB

Deceased.

GENERAL CLAIM

Claim of Richard R. Bergeron, RFD 2, Danis Park Road,

NAME

Goffstown, N.H. 03045

ADDRESS

The undersigned creditor of the above-named deceased presents this claim against the deceased a statement of which is hereto annexed, marked "A".

See Attachment "A"

Market Value of Union Leader Corp. a/o 9/13/81	divided by:	Total number of ULC full-time common law employees a/o 9/13/81
	or alternatively	
Total issued and outstanding shares of Union Leader Corporation	divided by:	Total Number of Union Leader Corporation common law employees a/o 9/13/81

STATE OF NEW HAMPSHIRE
SS
COUNTY OF HILLSBOROUGH

The undersigned, being duly sworn, says: that — he is the undersigned creditor named in and who makes the foregoing claim against the estate of WILLIAM LOEB, deceased, that the amount of said claim, to wit: the sum of [See above], is justly due to said claimant, that no payments have been made thereon which are not credited, and there are no offsets to the same to the knowledge of this affiant: that affiant has personal knowledge of all the facts of said claim.

/s/Richard L. Bergeron

My Commission Expires:
August 27, 1985

Subscribed and sworn to before me
this 16th day of March 1982

/s/ Alan P. Cleveland
Notary Public

ATTACHMENT "A"

The deceased, William Loeb, was sole owner and shareholder of the Union Leader Corporation, incorporated and doing business in the State of New Hampshire. On numerous occasions and to induce the loyal service of myself and other employees of his company, the deceased repeatedly stated that, upon his death, ownership of the company would be divided among and devised to its then employees who were such as of his death.

As of September 13, 1981, the date of Mr. Loeb's death, the undersigned was a full time employee of the Union Leader Corporation and entitled to receive a pro rata share of the company, or its cash equivalent, as a creditor of the decedent's estate. Although the undersigned cannot state the specific dollar value of this claim, my rightful share of ownership of the Union Leader Corporation can be expressed as follows:

Market Value of Union Leader Corp. a/o 9/13/81	divided by:	Total number of ULC full-time common law employees a/o 9/13/81
	or alternatively	
Total issued and outstanding shares of Union Leader Corporation	divided by:	Total Number of Union Leader Corporation common law employees a/o 9/13/81

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: June 13, 1984 JUDI BAILEY, /s/ _____
Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada. Richard R. Bergeron

By /s/_____Deputy.

Appendix B.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

RICHARD R. BERGERON,
Plaintiff

v.

ESTATE OF WILLIAM LOEB, THE WILLIAM LOEB UNION LEADER TRUST, NACKEY S. LOEB, (individually, as Executrix of The Estate of William Loeb, and as Trustee of The William Loeb Union Leader Trust), and the SECURITY NATIONAL BANK OF NEVADA
Defendants

CIVIL ACTION NO.

CLASS ACTION
JURY TRIAL

COMPLAINT
PRELIMINARY STATEMENT

1. This action seeks a declaration of the present right of Plaintiff and other employees of the Union Leader Corporation to receive ownership of the Corporation as of William Loeb's death. The Estate of William Loeb, by Nackey Loeb as Executrix, has refused to pay Plaintiff's claim for his ownership interest in the Corporation. Rather, the issued and outstanding stock of the Union Leader Corporation, previously held by William Loeb, has been transferred to an entity known as the William Loeb Union Leader Trust, subject to a community property interest claimed by Nackey S. Loeb, and said stock has further been pledged and transferred to the Security National Bank

of Nevada, all of which are fraudulent and unlawful attempts by Defendants to deprive Plaintiff and other employees of the Corporation of their right to receive ownership of the Corporation upon William Loeb's death, and in violation of the Uniform Fraudulent Conveyances Act as codified into the New Hampshire Revised Statutes. This action further seeks a determination that William Loeb's continuous conduct, representations and offer to employees commencing in 1957 that they would receive ownership of the Corporation upon his death was a fraudulent and unlawful scheme of misrepresentation in violation of the Securities Exchange Act of 1934. The action further seeks permanent injunctive relief against the assets or stock of the Union Leader Corporation from being transferred or encumbered, and an order directing specific performance according to the terms of Loeb's covenant that ownership of the Union Leader Corporation be transferred to employees of the Corporation as of the date of his death.

JURISDICTION AND VENUE

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 78aa, this being an action arising in part under Section 10(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), 15 U.S.C. §§ 78a et seq., and Rule 10b-5, 17 C.F.R. § 240.106-5 promulgated thereunder, and the principles of pendent jurisdiction. Jurisdiction is also invoked pursuant to 28 U.S.C. § 1332, there being diversity among the parties. The amount in controversy, exclusive of interests and costs, exceeds $10,000. The Plaintiff further invokes the jurisdiction of the Court under the provisions of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., seeking a declaration that the Defendants' actions violate the rights of Plaintiff to own stock in the Union Leader Corporation. Venue is appropriate to this District pursuant to 28 U.S.C. § 1391.

PARTIES

3. Plaintiff Richard R. Bergeron (hereinafter sometimes also "the Plaintiff") is an individual residing at Danis Park Road, Goffstown, New Hampshire. He is now and has been for all times relevant herein employed by the Union Leader Corporation as a pressman, and also presently serves as President of Local 267 of the International Printing and Graphic Communications Union. he brings this action for himself in his individual capacity and on behalf of the entire class of Union Leader Corporation employees similarly situated.

4. William Loeb, whose Estate is a Defendant herein, was an individual who deceased September 13, 1981 in Burlington, Massachusetts, and at the time of his death and for all times relevant herein was domiciled and residing at Prides Crossing, Beverly, Massachusetts, and was, from 1946 until his death, President of the Union Leader Corporation, a New Hampshire corporation located in Manchester, New Hampshire (hereinafter sometimes also "the Corporation"). At the time of his death, William Loeb was the owner-in-fact of 100% of the issued and outstanding stock of the Corporation.

5. Defendant Nackey S. Loeb (hereinafter sometimes also "the Defendant Loeb") is an individual domiciled and residing at Prides Crossing, Beverly, Massachusetts. She was the spouse of William Loeb since July 15, 1952 until the time of his death, is the Executrix and sole beneficiary of the Estate of William Loeb, is presently the sole Trustee of the so-called "William Loeb Union Leader Trust", and is currently President of the Union Leader Corporation.

6. Defendant William Loeb Union Leader Trust, as amended from time to time (hereinafter sometimes also "the Trust"), was created as a revocable *inter vivos* trust in Manchester, New Hampshire on August 17, 1979 by its self-named grantors, William Loeb and Nackey S. Loeb, amended at Prides

Crossing, Beverly, Massachusetts on August 25, 1980, and again on June 1, 1981, and purports under its terms to be governed by the laws of the State of Nevada, including the Spendthrift Trust Act of Nevada. [A copy of the Trust dated August 17, 1979, and the two known amendments thereto of August 25, 1980 and June 1, 1981 are appended to this Complaint as ATTACHMENT A].

7. Defendant Security National Bank of Nevada (hereinafter sometimes also "the Security National Bank" or "SNB") is a national banking association organized under the laws of the United States of America, and located at One East Liberty Street, Reno, Nevada 89504.

CLASS ACTION ALLEGATIONS

8. The named Plaintiff brings this action individually and on behalf of the entire class of persons similarly situated pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure.

9. The class of persons represented by the Plaintiff consists of all persons who were common law employees of the Union Leader Corporation as of the time of William Loeb's death on September 13, 1981.

10. The members of Plaintiff's class are so numerous that joinder is impracticable. Although the exact size of Plaintiff's class is not yet known, it is believed to be comprised of the more than 250 persons who were employees of the Corporation as of William Loeb's death and whose identification is subject to precise determination through information within the control of the Defendant Nackey Loeb.

11. Questions of law and fact common to the class predominate over any questions affecting only individual members, and a class action is superior to any other available method for the fair and efficient adjudication of this controversy. The

claims of the named Plaintiff are typical and representative of the claims of the class. The named Plaintiff has the same interests as do the other members of the class, has been advised and understands that as representative of a class this Honorable Court will oversee his conduct as acting on behalf of the interests of the plaintiff class, and that Plaintiff will vigorously prosecute those claims on behalf of the class.

12. The prosecution of separate actions by individual members of the class would create the risk of inconsistent or varying adjudications which might establish incompatible standards of conduct for the Defendant(s), and would create the risk of adjudications which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudication and would substantially impair their ability to protect their interests.

13. The actions of Defendant(s) in denying the claims of the named Plaintiff apply to the general claims of the class as a whole, and thereby make appropriate the injunctive relief sought by this Complaint.

14. Upon information and belief: (a) No members of the class have an interest in individually controlling the prosecution of separate actions; (b) no litigation concerning the claims herein set forth has already been commenced by other members of the class; (c) it is desirable to concentrate the litigation of the claims in a single forum, and this Court is a particularly suitable forum since virtually all the class members reside within this District, the acts and transactions giving rise to the claims occurred within this District, the information pertinent to this case is conveniently located within the District, the property claimed by the plaintiff class is located within the District, and the Defendants transact business within this District; (d) venue is proper for this District; and (e) no unusual difficulties will be encountered in the management of this as a class action.

GENERAL ALLEGATIONS

15. On October 28, 1946, William Loeb established the W.L. Publishing Corporation under the laws of the State of New Hampshire for the purpose of its acquiring the business and assets of the publisher of the *Manchester Union* and *Manchester Leader* newspapers. The Union-Leader Publishing Company, from its then owner, Mrs. Frank Knox of Manchester, New Hampshire. The authorized capital stock of the W.L. Publishing Corporation consisted of 5,000 shares of common stock having the par value of $1.00 each. Subsequent to its incorporation, but not later than November 21, 1946, the corporate name of W.L. Publishing Corporation was changed to that of the "Union Leader Corporation".

16. On October 31, 1946, William Loeb purchased from Mrs. Frank Knox all of the outstanding stock of The Union Leader Publishing Company for cash in the amount of $1,257,583.33. On November 21, 1946, William Loeb purchased all 5000 shares of the authorized and issued capital stock of the Union Leader Corporation (that entity previously known and incorporated under the name "W.L. Publishing Corporation") in consideration for his transfer to the Union Leader Corporation of all of the business and assets of The Union-Leader Publishing Company. In addition to stock, William Loeb received from Union Leader Corporation demand and serial notes aggregating in principal the sum of $1,107,583.33. William Loeb that same date transferred ownership of 2,500 shares of the 5,000 shares of Union Leader Corporation stock then held in his name to Ridder Publications, Inc., and retained individual ownership of the remaining 2,500 shares of the total authorized and issued capital stock of Union Leader Corporation.

17. On May 26, 1947, Ridder Publications, Inc. transferred to Leonard V. Finder ownership of the 2,500 shares of Union

Leader Corporation stock then held by Ridder, and, on April 29, 1949, Finder transferred his ownership of the 2,500 shares of Union Leader Corporation stock to William Loeb. As of April 29, 1949, William Loeb was the sole owner of 5,000 shares of Union Leader Corporation stock, representing the entire authorized and issued capital stock of the Corporation.

18. Beginning in 1949, William Loeb established a cash profit-sharing plan covering employees of the Union Leader Corporation, which provided that 50% of the Corporation's profits before taxes were to be annually distributed among employees of the Corporation. In connection with this cash profit-sharing plan, a junior board of directors, comprised of 11 non-management representative employees, was established to review financial statements of the Corporation on a monthly, quarterly, and annual basis, and to advise the Corporation's Board of Directors with respect to major management decisions in the operation of the business.

19. In 1957, in consideration of the promise of William Loeb to the employees of the Union Leader Corporation they would receive ownership of the Corporation upon his death, the employees of the Corporation accepted Loeb's termination of the cash profit sharing plan. During the period of its operation from 1949 to 1957, employees of the Corporation had received aggregate cash payments under the plan totalling $696,472.82.

20. In the Fall of 1957, William Loeb founded a daily newspaper in Massachusetts, the *Haverhill Journal*, in competition with the *Haverhill Gazette*, which was then being struck by the International Typographical Union. During November and December of 1957, William Loeb requested employees of the Corporation not to press demands for wage increases or other employee compensation and benefits, but rather to support Loeb in his *Haverhill Journal* venture by being loyal employees, staying on the job at the same rates of pay, and

being available to work overtime in printing an additional newspaper, the *Haverhill Journal,* all in consideration for which employees of the Corporation would, according to Loeb, receive upon Loeb's death ownership of the Union Leader Corporation, enhanced by the addition of a profitable newspaper property, the *Haverhill Journal.*

21. On September 26, 1956, William Loeb established the Retirement Profit Sharing Plan and Trust for the Benefit of Employees of the Union Leader Corporation (hereinafter also "the deferred profit-sharing plan"), which provided that covered employees of the Corporation would annually receive allocated to their individual accounts under the Plan amounts contributed by the Corporation equal to the lesser of 25% of the Corporation's annual profits before taxes in excess of $26,000, or 15% of the annual payroll of covered employees.

22. In 1959, in consideration of employee acceptance of retroactive deletion of the provision of the deferred profit-sharing plan obligating the Corporation to make contributions to employee accounts in accordance with the formula described under Paragraph 21 above, Loeb represented to employees that they could expect the Corporation to increase $40 in value for each $1 that the Corporation used to finance continued operation of the *Haverhill Journal* rather than contributed to the employees' deferred profit sharing plan, and that the employees would receive the value of this corporate enhancement as owners of the Corporation upon Loeb's death. During the two-year period 1956 through 1957 that the mandatory contribution formula of the deferred profit-sharing plan was in effect, employees of the Corporation received allocations into their individual accounts under the plan totalling $270,000.

23. From 1957 until his death in 1981, William Loeb, by numerous verbal and written statements through a multiplicity of private and public communications to employees of the Corporation and the general public, continuously restated and

confirmed his agreement and obligation that upon his death those loyal employees then employed by the Corporation would each receive pro rata capital ownership of the Union Leader Corporation.

24. By a series of transactions during the period September 30, 1956 through to July 7, 1960, William Loeb sold 1,250 shares of Union Leader Corporation stock to the deferred profit-sharing plan in consideration of his receipt of $375,000 in cash from the plan.

25. Under the terms of a personal guaranty and pledge agreement dated May 1, 1959, William Loeb did pledge to Alexander E. Cymrot, then a Director of the Corporation, all Union Leader Corporation stock then held in Loeb's name as collateral to secure a $300,000 loan from Cymrot to the Corporation. This pledge of Union Leader Corporation stock by Loeb to Cymrot as security for corporate borrowing was reaffirmed by supplemental loan agreements and promissory notes between and among Loeb, Cymrot and the Corporation dated June 1, 1959 and June 1, 1960, evidencing additional borrowings of $200,000 by the Corporation from Cymrot.

26. To finance repayment of the Corporation's balance of unpaid principal on the aforesaid borrowings from Cymrot, then outstanding in the amount of $350,000, Loeb personally borrowed $500,000 from the Teamsters Central States, Southeast and Southwest Areas Pension Fund on or about April 8, 1963. To secure this Teamsters loan, Loeb did pledge, endorse and transfer to the Trustees of the Teamster's Pension Fund stock certificates representing all 3,750 shares of Union Leader Corporation stock then owned by Loeb and not held in trust by the deferred profit-sharing plan.

27. On or about June 25, 1965, the Union Leader Corporation borrowed $2,000,000 from the Teamsters Central States, Southeast and Southwest Areas Pension Fund, the proceeds of which were used to repay the aforementioned $500,000

borrowed in 1963 by Loeb from the Teamsters Fund and to settle certain pending anti-trust litigation, entitled *Union Leader Corporation* vs. *Newspapers of New England, Inc.*, arising from Loeb's publication of the *Haverhill Journal*. To secure this corporate borrowing, Loeb did again pledge to the Teamsters Fund all Union Leader Corporation stock of which he was shareholder of record under the terms and conditions of an Agreement and Stockholder's Pledge dated June 25, 1965.

28. The aforementioned 3,750 shares of Union Leader Corporation stock, represented by certificates numbered 1 and 16, remained in the possession and control of agents, representatives and custodians of the Teamsters Pension Fund from June 25, 1965 until on or about March 7, 1979. On said latter date, the Union Leader Corporation did borrow $900,000 from the Security National Bank of Nevada, the proceeds of which were used to pay in full the remaining balance owed the Teamsters on the 1965 loan, and by which William Loeb regained possession of the 3,750 shares of Union Leader Corporation stock which had been held by the Teamsters Fund as collateral.

29. On or about August 17, 1979, William Loeb created the Defendant William Loeb Union Leader Trust, appointed Defendant Nackey Loeb as sole trustee thereof, and transferred to the Defendant William Loeb Union Leader Trust the 3,750 shares of Union Leader Corporation stock then registered in the name of William Loeb.

30. On or about August 25, 1980, William Loeb, Defendant Nackey Loeb, and the Defendant William Loeb Union Leader Trust did transfer and pledge the 3,750 shares of Union Leader Corporation stock then held in trust to the Defendant Security National Bank of Nevada ("SNB") as security for a $2,000,000 loan from Defendant SNB to the Union Leader Corporation. The proceeds of said loan were used by the Corporation to purchase from the Augsbury Organization Inc. of Ogdensburg,

New York, 1,250 shares of Union Leader Corporation stock. On December 31, 1979, Augsbury Organization, Inc. had purchased through bid from the deferred profit-sharing plan the 1,250 shares of Union Leader Corporation stock for $1,505,000 cash pursuant to a Consent Order dated July 9, 1979, settling the consolidated case of *Mahoney* v. *Union Leader, et al.* and *Marshall* v. *William Loeb, et al.* Upon its receipt of the stock, the Union Leader Corporation retired all 1,250 shares as treasury stock.

31. Except for the period August 17, 1979 to August 25, 1980, and since May 1, 1959, that 3,750 shares of Union Leader Corporation stock of which William Loeb had been the shareholder of record remained pledged and in the physical possession of third-party creditors of Loeb and/or the Corporation, and on the date of Loeb's death, September 13, 1981, said stock had again been pledged and transferred to a third-party creditor — the Defendant SNB.

32. On the date of William Loeb's death the Plaintiff Bergeron was employed as a pressman of the Union Leader Corporation.

33. In December 1981, Plaintiff requested of management of the Corporation documentation relative to the estate plan of William Loeb, and on or about December 16, 1981, through William J. Hybsch, Labor Relations Director of the Union Leader Corporation, received an expurgated copy of the William Loeb Union Leader Trust, dated August 17, 1979, and also received copies of the amendments thereto dated August 25, 1980 and June 1, 1981. [Please see ATTACHMENT A to this Complaint].

34. On March 16, 1981, Plaintiff Bergeron made a claim against the Estate of William Loeb for his proportionate share of the ownership equity and capital assets of the Union Leader Corporation (a copy of said General Claim is appended hereto as ATTACHMENT B), which claim was summarily rejected

by Defendant Nackey Loeb as Executrix of and on behalf of the Estate of William Loeb (a copy of said Notice of Rejection of Claim, dated March 28, 1982, is appended hereto as ATTACHMENT C).

COUNT I

35. Plaintiff Bergeron, as an employee of the Union Leader Corporation, was party to the agreement between William Loeb and the employees of the Corporation that upon the death of William Loeb the Plaintiff and other employees would receive ownership of the Corporation if they would display greater worker productivity, remain in employment with the Corporation, demonstrate steadfast employee loyalty to Loeb and the Corporation, and forbear from making demand on Loeb and the Corporation for additional employee compensation and benefits.

36. The aforementioned representations and promise of Loeb were knowingly false when made by him since, when making these representations, Loeb did not have the intention or ability to perform a transfer of ownership of the Union Leader Corporation to Plaintiff and other employees of the Corporation upon his death. Since May 1, 1959, the promise made by William Loeb was impossible of performance insofar as the Union Leader Corporation stock was pledged, endorsed and transferred to third-party creditors of Loeb and the Corporation.

37. The representations and promise made by Loeb to Plaintiff and other employees regarding their ownership of the Union Leader Corporation upon Loeb's death was made with the fraudulent intention of inducing, or with the reasonable expectation of inducing, the Plaintiff's and other employees' reliance thereon.

38. The Plaintiff and other employees believed in and reasonably relied upon the promise and representations of Loeb in that they remained in employment with and exhibited extraordinary loyalty to Loeb and the Corporation, worked productively without job stoppage and in labor peace, and did forbear from making demand of cash or deferred compensation or additional employee benefits as would have been made in the absence of Loeb's promise of employee ownership of the Corporation upon his death, and such was the form of reliance and employee conduct and performance Loeb sought to receive when making his promise and representations.

39. The aforementioned performance of and conduct by Plaintiff and other employees conferred a benefit upon William Loeb as then owner of the Union Leader Corporation by enabling the Corporation to operate more productively with trained and experienced employees of high morale, to increase its profits by operating with lesser expenses and reduced employee turnover, and to operate its business without the threat of disruption of systematic and peaceful labor activity.

40. The transfer by William Loeb on or about August 17, 1979 of his interest in the 3,750 shares of Union Leader Corporation stock to the William Loeb Union Leader Trust did not constitute performance of but rather a breach of Loeb's promise to transfer ownership of the Corporation to Plaintiff and other employees upon Loeb's death. By operation of Paragraph 3 of said Trust (appended hereto as ATTACHMENT A), Plaintiff and other employees will not receive ownership of the Union Leaer Corporation unless employed by the Corporation as of the date of death of the next to last successor trustee of the Defendant Trust. Although the identities of the 10 successor trustees have been kept hidden from Plaintiff, such trustees are believed to include those whose present youth and natural life span make virtually certain that neither Plaintiff nor any other present employee of the Corporation will survive

to receive distribution of an ownership interest in the Union Leader Corporation under the terms of said Trust.

41. During the period from approximately 1956 through to the date of his death in 1981, William Loeb, directly and indirectly, by the use of the mails and other means and instrumentalities of interstate commerce, employed devices, schemes, and artifices to defraud; made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and engaged in acts, practices, and courses of business which operated as a fraud and deceit upon the Plaintiff and other employees of the Corporation in connection with the offer and purchase of securities of the Union Leader Corporation, and all in violation of Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

42. Plaintiff and other employees of the Corporation, relying upon William Loeb's fraudulent statements and omissions described above, have been damaged in not receiving the securities of the Corporation bargained for and for which consideration has been given.

WHEREFORE, Plaintiff prays this Court order the following relief:

> Enjoin the Defendants, and all of them, from the sale, transfer, or encumbrance of the stock and/or business and assets of the Union Leader Corporation during the pendency of this action; direct specific performance by Defendant Nackey Loeb, as Executrix of the Estate of William Loeb and Trustee of the William Loeb Union Leader Trust, to transfer and deliver to Plaintiff and all employees of the Corporation as of September 13, 1981 their respective proportionate shares of ownership of the Union Leader Corporation; award Plaintiff the reasonable costs

of this action, including counsel fees, expert fees, court costs and disbursements, as provided under the Securities Exchange Act, 15 U.S.C. § 78r(a), and applicable state and federal case law; and grant such other and further relief as may be equitable and just.

COUNT II

43. Plaintiff incorporates herein by reference Paragraphs 1 through 40 of this Complaint.

44. The conduct of Plaintiff and other employees of the Corporation, stated under Paragraphs 38 and 39 herein, constitutes sufficient consideration in support of the promise of William Loeb to transfer ownership of the Union Leader Corporation to employees of the Corporation upon his death.

45. Loeb's promise to transfer ownership of the Union Leader Corporation, and the conduct of Plaintiff and other employees taken in reliance on decedent's promise, constitutes a contract between the decedent Loeb and the Plaintiff and other employees of the Corporation, obliging present performance by Loeb's Estate in conveying to the Plaintiff and other employees ownership of the Union Leader Corporation in accordance with said promise and agreement.

46. Under the terms of Loeb's Last Will and Testament, dated September 26, 1980 [a copy of which is appended to this Complaint as ATTACHMENT D], ownership of the Union Leader Corporation was not in fact devised to the employees of the Corporation, but rather to the named beneficiary of Loeb's entire estate, his spouse, Nackey S. Loeb, and her heirs and beneficiaries.

47. Failure of the Executrix of the Estate of Loeb to transfer ownership of the Corporation to Plaintiff and other employees as of Loeb's death constitutes a failure to perform and breach

of Loeb's agreement and implied covenant of good faith with the Plaintiff and other employees of the Corporation.

48. William Loeb was under a continuing obligation during his life to tell the truth when making representations to Plaintiff and other employees of the Corporation regarding the agreement and covenant of good faith to transfer ownership to employees of the Corporation upon his death.

49. Evidenced by Loeb's conduct in pledging and otherwise transferring and devising his ownership interest in the Union Leader Corporation to parties other than employees of the Corporation, as more particularly alleged under this Complaint, Loeb never intended to fulfill his agreement and covenant to transfer to the employees ownership of the Corporation upon his death.

WHEREFORE, Plaintiff prays this Court order the following relief:

> Enjoin the Defendants, and all of them, from the sale, transfer, or encumbrance of the stock and/or business and assets of the Union Leader Corporation during the pendency of this action; direct specific performance by Defendant Nackey Loeb, as Executrix of the Estate of William Loeb and Trustee of the William Loeb Union Leader Trust, to transfer and deliver to Plaintiff and all employees of the Corporation as of September 13, 1981 their respective proportionate shares of ownership of the Union Leader Corporation; award Plaintiff the reasonable costs of this action, including counsel fees, expert fees, court costs and disbursements; and grant such other and further relief as may be equitable and just.

COUNT III

50. Plaintiff incorporates herein by reference Paragraphs 1 through 40 and Paragraphs 44 through 49 of this Complaint.

51. By operation of the above alleged promises, representations and agreement of William Loeb to transfer ownership of the Union Leader Corporation to Plaintiff and other employees of the Corporation, and by the performance and forbearance of the Plaintiff and other employees in reliance thereon, William Loeb incurred an obligation to transfer to employees of the Corporation upon his death the 3,750 shares of Union Leader Corporation stock of which William Loeb was the registered sole owner as of August 17, 1979, and which were personal assets of William Loeb. Plaintiff and other employees of the Corporation were then and are now "creditors" of William Loeb, who is their "debtor" within the meaning of Section 1 of the Uniform Fraudulent Conveyances Act, New Hampshire RSA 545:1.

52. The transfer by Loeb of his ownership interest in Union Leader Corporation stock to the William Loeb Union Leader Corporation Trust on August 17, 1979, as previously alleged under Paragraphs 30 and 40 herein, constitutes a "conveyance" within the meaning of Section 2 of said Uniform Fraudulent Conveyances Act.

53. The transfer of Union Leader Corporation stock to the Defendant Trust was made for no fair consideration, but rather gratuitously, rendering Loeb unable to pay his debts to Plaintiff and other employees of the Corporation as they became absolute and matured on the date of Loeb's death.

54. Under the terms of Loeb's promise and agreement, the only means by which Loeb could discharge his debt to Plaintiff and other employees of the Corporation was for his Estate to deliver to them, in specie, the ownership of Union Leader Corporation represented by the stock that had been transferred by Loeb to the Defendant Trust.

55. This transfer of stock rendered Loeb "insolvent" within the meaning of Sections 2 and 4 of the Uniform Fraudulent Conveyances Act, New Hampshire RSA §§ 545:2 & 4, as the

value of the assets of his remaining estate, on good information and belief, was less than the amount required to discharge Loeb's existing debts to Plaintiff and other employees of the Corporation as they become absolute and matured.

56. At the time of the transfer of stock to Defendant Trust, Loeb intended to and believed he would incur debts beyond his ability to pay as they matured, and intended that the effect of said transfer to the Trust would be to hinder, delay and defraud the Plaintiff, and all other employees of the Corporation as of September 13, 1981, of their receiving the promised consideration of ownership of the Union Leader Corporation.

57. At the time of said transfer of Loeb's stock to the William Loeb Union Leader Trust, Defendant Nackey Loeb, as sole Trustee of the Defendant Trust, was fully informed as to the material facts of William Loeb's debt to employees of the Defendant Trust was fraudulent as to the Plaintiff and other employees of the Corporation.

58. The transfer to the Defendant Trust of Union Leader Corporation stock owned by William Loeb is and was fraudulent as to the Plaintiff and other employees of the Corporation, whose claims are now mature.

WHEREFORE, Plaintiff prays this Court order the following relief:

> Enjoin the Defendants, and all of them, from the sale, transfer or encumbrance of the stock and/or business and assets of the Union Leader Corporation during the pendency of this action; set aside and annull the August 17, 1979 conveyance of Union Leader Corporation stock from William Loeb to the Defendant William Loeb Union Leader Trust; vest title of said Union Leader Corporation stock in the Plaintiff and other employees of the Corporation as of September 13, 1981; direct specific performance by Defendant Nackey Loeb, as Executrix of the

Estate of William Loeb and Trustee of the Defendant Trust, to transfer and deliver to Plaintiff and all employees of the Corporation as of September 13, 1981 their respective proportionate shares of ownership of the Union Leader Corporation; award Plaintiff the costs of this action, including counsel fees, expert fees, court costs and disbursements; and grant such other relief as may be just and equitable.

COUNT IV

59. Plaintiff incorporates herein by reference Paragraphs 1 through 40, Paragraphs 44 through 49, and Paragraphs 51 through 58 of this Complaint.

60. On August 25, 1980, William Loeb and the Defendant Nackey Loeb executed a First Amendment to the William Loeb Union Leader Trust, which authorized the Defendant Loeb to pledge to the Security National Bank of Nevada, the Union Leader Corporation stock held by the Defendant Trust, allegedly "to constitute additional collateral for a loan to Two Million ($2,000,000.00) Dollars to the Union Leader Corporation." [Please see ATTACHMENT A to this Complaint].

61. On or about August 25, 1980, Defendant Loeb, as trustee of the Defendant Trust, did pledge and transfer to the Security National Bank the 3,750 shares of Union Leader Corporation stock then held in trust.

62. On good information and belief, as of August 25, 1980 the value of a 100% ownership interest in Union Leader Corporation, represented by the pledged 3,750 shares of Corporation stock, was an amount substantially in excess of $20,000,000.

63. The Defendant Security National Bank was already secured in its $2,000,000 loan to the Corporation by the real and personal property and other tangible and intangible prop-

erty of the Corporation having a liquidated value substantially in excess of $2,000,000.

64. The antecedent debt of the Union Leader Corporation to SNB in the amount of $2,000,000, was and is disproportionately small as compared with the value of the stock and other collateral then pledged to Defendant SNB.

65. The stock pledge to Defendant SNB was not given for fair consideration within the meaning of Section 3 of the Uniform Fraudulent Conveyances Act, New Hampshire RSA § 545:3(II).

66. At the time of the stock pledge, Defendant SNB, through its agents, officers and representatives, had full knowledge of William Loeb's personal and financial affairs, or at least had knowledge of such facts as would have suggested a good faith investigation thereof, as to determine Loeb's obligation to transfer ownership of the Union Leader Corporation to employees of the Corporation upon Loeb's death and that the Defendant Trust's title to the pledged stock was voidable as obtained through fraud on plaintiff and other employees as creditors of Loeb.

67. Defendant SNB is not and was not a "purchaser for fair consideration without knowledge of the fraud at the time of the purchase" within the meaning of Section 9 of the Uniform Fraudulent Conveyances Act, New Hampshire RSA § 545:9(I).

68. The pledge and transfer of Union Leader Corporation stock to Defendant SNB is and was fraudulent as to the Plaintiff and other employees of the Corporation, whose claims are now mature.

WHEREFORE, Plaintiff requests the Court to order the following relief:

Enjoin the Defendants, and all of them, from the sale, transfer or encumbrance of the stock and/or business and

assets of the Union Leader Corporation during the pendency of this action; set aside and annull the August 25, 1980 conveyance and pledge of Union Leader Corporation stock from the Defendant Trust to the Defendant SNB; vest unencumbered title of said Union Leader Corporation stock in the Plaintiff and other employees of the Corporation as of September 13, 1981; direct specific performance by Defendant Nackey Loeb, as Executrix of the Estate of William Loeb and Trustee of the Defendant Trust, to transfer and deliver to Plaintiff and all employees of the Corporation as of September 13, 1981 their respective proportionate shares of ownership of the Union Leader Corporation; award Plaintiff the costs of this action, including counsel fees, expert fees, court costs and disbursements; and grant such other relief as may be just and equitable.

COUNT V

70. Plaintiff incorporates herein by reference Paragraphs 1 through 40, Paragraphs 44 through 49, Paragraphs 51 through Paragraph 58 of this Complaint.

71. Under the terms of the "Declaration" and Paragraph 6 of the William Loeb Union Leader Trust is contained a claim by the grantors, William Loeb and the Defendant Nackey Loeb, that the 3,750 shares of Union Leader Corporation stock then registered in the name of William Loeb is "community property".

72. As alleged in Paragraphs 15 through 17 of this Complaint, William Loeb acquired his interest in Union Leader Corporation stock prior to his marriage to Nackey S. Loeb.

73. William Loeb and Nackey S. Loeb for all times relevant to this Complaint have not been domiciliaries of the State of

Nevada, but rather domiciled in, resident of and subject to the laws of the Commonwealth of Massachusetts, a non-community property state.

74. Any appreciation in the value of Union Leader stock subsequent to the July 15, 1952 marriage of William Loeb and Nackey Loeb was not due to any services rendered by either party but by the independent economic forces of inflation, by the inherent advantage of operating a newspaper monopoly in a growing community, and by the productivity and labor peace contributed by other employees of the Corporation.

75. William Loeb and Nackey S. Loeb were each well-compensated by the Corporation for any services rendered it as officers of the Corporation.

76. The Union Leader Corporation stock transferred by William Loeb to the Defendant Trust is not community property but the separate property of William Loeb.

77. The Second Amendment to the Trust, dated June 1, 1981 (appended hereto as ATTACHMENT A), states that if the Union Leader Corporation stock is deemed not community property, at the death of the first spouse, a one half (½) interest in the stock shall pass to the surviving spouse in trust, and was intended to be a testamentary disposition by William Loeb, executed by him very shortly before and in contemplation of his then imminent death.

78. The Second Amendment has only one witness, that person taking the acknowledgment — Ralph Warren Sullivan, Esq., and is therefore invalid as a testamentary disposition.

79. The attempt by William Loeb under the Second Amendment to transfer stock in trust to his surviving spouse was made with the intent to further hinder, delay and defraud his creditors, Plaintiff and other employees of the Corporation, in their receipt of ownership of the Union Leader Corporation upon Loeb's death.

80. At the time of this gratuitous transfer of William Loeb's interest in Union Leader Corporation stock to Defendant Nackey Loeb, Defendant Loeb had full knowledge of William Loeb's personal financial affairs, and his obligations to the Plaintiff and the other employees of the Corporation.

81. The conveyance of a one-half (½) interest in the Corporation stock to Defendant Loeb was not given for fair consideration within the meaning of Section 3 of the Uniform Fraudulent Conveyances Act, New Hampshire RSA § 545:3(II).

82. The conveyance of Union Leader Corporation stock to Defendant Loeb is and was fraudulent as to the Plaintiff and other employees of the Corporation, whose claims are now mature.

WHEREFORE, Plaintiff requests the Court to order the following relief:

> Enjoin the Defendants, and all of them, from the sale, transfer or encumbrance of the stock and/or business and assets of the Union Leader Corporation during the pendency of this action; declare the issued and outstanding stock of Union Leader Corporation to be the separate property of William Loeb and in which the Defendant Nackey Loeb has no interest; declare as null and void the Second Amendment to the Trust; set aside and annull the August 17, 1979 conveyance of Union Leader Corporation stock from William Loeb to the Defendant Trust; vest title of said Union Leader Corporation stock in the Plaintiff and other employees of the Corporation as of September 13, 1981; direct specific performance by Defendant Nackey Loeb, as Executrix of the Estate of William Loeb and Trustee of the Defendant Trust, to transfer and deliver to Plaintiff and all employees of the Corporation as of September 13, 1981 their respective propor-

tionate shares of ownership of the Union Leader Corporation; award Plaintiff the costs of this action, including counsel fees, expert fees, court costs and disbursements; and grant such other relief as may be just and equitable.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Respectfully submitted,
RICHARD R. BERGERON

By his Attorneys,
SHEEHAN, PHINNEY, BASS & GREEN
PROF. ASS'N

June 7, 1982

By: /s/_____
Alan P. Cleveland
1000 Elm Street
Manchester, New Hampshire 03101
(603) 668-0300

Appendix C

No. 81-10236
Dept. No. 9

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

In the Matter of the Estate of WILLIAM LOEB, Deceased	PETITION FOR DECLARATION OF RIGHTS AND FOR JUDGMENT THAT CREDITOR'S CLAIM IS BARRED

NACKEY S. LOEB, Executrix of the Estate of William Loeb, Deceased,

Plaintiff

vs.

RICHARD R. BERGERON,

Defendant.

NACKEY S. LOEB, acting under the Probate Code of the State of Nevada, and Section 30.060 Nevada Revised Statutes, relating to declaratory judgments, alleges:

I.

Nackey S. Loeb is the duly appointed and acting Executrix of the Estate of William Loeb, who died September 13, 1981,

a legal resident of, and domiciled in, Washoe County, Nevada, wherein he had been domiciled since 1952. William Loeb left an estate in Washoe County, Nevada, subject to administration. His Will was admitted to probate by Decree of this court entered and filed December 10, 1981. Nackey S. Loeb was appointed Executrix by that Decree, and duly qualified, and Letters Testamentary were issued to her December 21, 1981; there is no ancillary administration of decedent's estate.

II.

Richard R. Bergeron, RFD 2, Danis Park Road, Goffstown, N.H. 03045, filed a General Claim March 17, 1982, in the probate proceeding herein, claiming he was entitled to receive a pro rata share of the Union Leader Corporation, or its cash equivalent, as a creditor of the decedent's estate, namely, the market value of the Union Leader Corporation on September 13, 1981, divided by the total number of its full-time common law employees, or alternatively, the total issued and outstanding shares of the Union Leader Corporation divided by the total number of Union Leader Corporation common law employees.

III.

Richard R. Bergeron is subject to the jurisdiction of this court by reason of (a) his appearance in the probate proceeding; (b) his consent through having filed his Claim in the probate proceedings; and (c) under Section 14.065 Nevada Revised Statutes, by having transacted any business within the State, i.e. by having presented his claim to the Probate Court for adjudication.

IV.

The Claim was rejected by the Executrix March 28, 1982; the Rejection of the Claim was filed in the probate proceeding herein April 5, 1982, and Notice of Rejection of the Claim was mailed to Richard R. Bergeron by certified mail, to his address as stated in the Claim, April 5, 1982; and a copy of the Notice of Rejection of Claim was filed with the court April 5. 1982, and the Affidavit of Mailing was filed April 6, 1982.

V.

Under NRS 147,030, the holder of a claim must bring suit "in the proper court against the executor or administrator within sixty days, after such notice, whether the claim is due or not; otherwise, the claim shall be forever barred". No suit has been brought in the State of Nevada. A Complaint was filed in the Federal District Court of New Hampshire on June 7, 1982, against the Estate, and Nackey S. Loeb, Executrix thereof, and others, for various claims, including the rejected Creditor's Claim.

VI.

The Claim of Richard R. Bergeron is forever barred by reason of his not having brought suit in the proper court within sixty days after Notice of Rejection of his Claim; his suit was neither filed in the proper court as required by statute, nor was it filed within the sixty-day time limit prescribed by the statute.

WHEREFORE, Nackey S. Loeb requests:

1) An Order be entered, directing the Clerk of the above entitled court to issue a Citation to Richard R. Bergeron, setting forth a time and place for a hearing on this matter, and ordering Richard R. Bergeron to appear and show cause why judgment should not be entered adjudicating that the Claim of Richard R. Bergeron against the Estate of William Loeb is forever barred.

2) This matter be heard by the Court.

3) Judgment be entered that the Claim of Richard R. Bergeron against the Estate of William Loeb is forever barred.

DATED, June 18th, 1982.

HAWKINS, RHODES & SHARP
Attorneys for Nackey S. Loeb

By /s/_____
Prince A. Hawkins

/s/_____
Nackey S. Loeb, Executrix

Under penalty of perjury, the undersigned declares that she is petitioner named in the foregoing Petition for Declaration of Rights, and knows the contents thereof; that the pleading is true of her own knowledge, except as to those matters stated on information and belief, and that as to such matters she believes it to be true.

/s/ _____
Nackey S. Loeb.

No. 81-10236
Dept. No. 9

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

In the Matter of the Estate
of
WILLIAM LOEB,
Deceased

AFFIDAVIT OF SERVICE

NACKEY S. LOEB, Executrix of the Estate of William Loeb, Deceased,

Plaintiff

vs.

RICHARD R. BERGERON,

Defendant.

STATE OF NEW HAMPSHIRE:

ss

County of Hillsborough:

Lawrence J. Cronin Jr., being first duly sworn, deposes and says: That affiant is a citizen of the United States, over 21 years of age, and that affiant received the within Citation on the 25 day of June, 1982, and personally served RICHARD R. BERGERON, the within named defendant, on the 25 day of June, 1982, in Goffstown, County of Hillsborough, State of New Hampshire, by delivering to him a copy of the Citation attached to a copy of the within Petition and Order.

/s/ _____

Subscribed and sworn to before me this 25th day of June, 1982.

/s/ _____

Notary Public.

Appendix D

No. 82-5478
Dept. No. 7

filed 82 Jul 13 A9:41
JUDI BAILEY
By E. McKenzie
Deputy

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

In the Matter of THE WILLIAM LOEB UNION LEADER TRUST	JUDGMENT AND DECREE CONFIRMING APPOINTMENT OF TRUSTEE, AND JURISDICTION OVER THE TRUST AS A PROCEEDING IN REM.

Nackey S. Loeb having filed herein her Petition for confirmation of appointment as Trustee of the William Loeb Union Leader Trust, and the same coming on regularly this day for hearing, and proof having been made to the satisfaction of the Court, and the matter having been submitted, the Court finds:

1. Due and legal notice of this hearing has been given for the period and in the manner required by law, and is conclusive upon all persons.

2. William Loeb and Nackey S. Loeb, as Grantors, created The William Loeb Union Leader Trust by written instrument dated August 17, 1979, a copy of which, together with a First Amendment dated August 25, 1980, and a Second Amendment dated June 1, 1981, is annexed to the Petition herein. The trust provides that it shall be governed by the laws of the State of Nevada.

3. The corpus of the Trust was physically situate in the State of Nevada at the time of the creation of the Trust, and ever

since has been and now is physically located in the State of Nevada. The corpus of the Trust consists of 3,750 shares of the common stock of the Union Leader Corporation.

4. The Grantors were at the time of the creation of the Trust, legal residents of, and domiciled in, this County and State. The Grantor, William Loeb, continued to be a resident and domiciliary of the State of Nevada until his death September 13, 1981; the Grantor, Nackey S. Loeb, continues to be a resident and domiciliary of the State of Nevada.

5. The corpus of the Trust was the community property of William Loeb and Nackey S. Loeb. Upon the death of William Loeb, September 13, 1981, the Trust, as to his one-half community share therein, became irrevocable.

6. The place of business of petitioner as Trustee of the Trust, is Suite 416, Security Bank Building, One East Liberty Street, Reno, Nevada 89501.

7. Petitioner was appointed by the trust instrument to be the Trustee of the Trust, and has accepted the appointment, and is competent to serve.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Nackey S. Loeb be and hereby is confirmed as Trustee of the William Loeb Union Leader Trust.

2. This court has and shall have jurisdiction of the Trust as a proceeding in rem under Section 164.010(1) Nevada Revised Statutes.

DONE IN OPEN COURT this 13th day of July, 1982.

/s/ _____

Peter I. Breen
District Judge.

Appendix E

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Richard R. Bergeron

v. #C82-317

Estate of William Loeb
et al.

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

William Loeb, it is fair to say was a colorful and controversial figure in New Hampshire for much of the middle half of this century. Mr. Loeb was the principal stockholder of the Union Leader Corporation (ULC), publisher of the state's largest newspaper. Plaintiff herein is an employee of the ULC seeking to represent all employees. In dispute is ownership of the corporation following Mr. Loeb's death. Plaintiff contends that Mr. Loeb promised to give the Union Leader to the employees upon his death in return for the employees giving up rights in an existing profit sharing plan, but instead established a trust that withholds ownership of the res until the death of the next to the last of Loeb's widow and ten successor trustees. Plaintiff's complaint sounds in constructive trust, breach of contract, and fraudulent conveyance.

Mr. Loeb's estate is in the process of being probated in the Nevada courts. The plaintiff here filed a general claim against the estate. This claim was denied. Plaintiff thereupon filed the instant action. Less than a week later, the defendant herein filed an action for a declaratory judgment in the Washoe County, Nevada District Court seeking a determination that

claims of creditors are forever barred. Plaintiff, who has not answered that action, now seeks a preliminary injunction enjoining the Nevada court from proceeding with the declaratory judgment action.

The standard to be applied to a motion for a preliminary injunction in this Circuit is set out in *Planned Parenthood League of Mass.* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981). That standard requires a four prong showing by the moving party; 1) plaintiff will suffer irreparable injury; 2) plaintiff's injury outweighs potential injury to defendants; 3) a likelihood of success on the merits; 4) public interest will not be adversely affected. The decision to issue a preliminary injunction is within the sound discretion of the trial court. *See, also, Palmigiano* v. *Travisono*, 317 F. Supp. 776 (D.R.I. 1970); *Saloman North America* v. *AMF Inc.*, 484 F. Supp. 846, 848 (D. Mass. 1980).

Plaintiff seeks through this action to bring back into the estate the stock which he claimed was fraudulently conveyed to the equitable owner. That stock would then be available to be distributed to the plaintiff should he prevail upon the general claim he filed in The Nevada Probate Court. In order to obtain the relief he seeks plaintiff must prevail in both courts, but he must prevail initially in this court. If the estate is closed before the trust is pierced, the mechanism of the probate proceeding is lost. If the claim is allowed before the trust is pierced, plaintiff fears the assets of the estate will not cover the debt he claims. This argument fails to establish irreparable harm for several reasons. In the first instance, the assets at stake here are not at risk; they are held in trust. There is no claim that the trustee is breaching that trust or that the assets are wasting, such that equity should intervene with an extraordinary remedy. Secondly, the probate proceedings are not plaintiff's only available avenue of relief. As plaintiff has alleged fraud, a constructive trust in favor of the present beneficial

owners could be imposed directly upon the express trust. *See, Patey* v. *Peaslee*, 101 N.H. 26 (1957). Cf. *Cornwell* v. *Cornwell*, 116 N.H. 205, 208-209 (1976). Thirdly, there has been no showing that the assets of the estate are insufficient to pay plaintiff should he prevail in Nevada Probate Court. We disagree with plaintiff that the comparison must be between the estate as probated and the total value of the ULC. Although this action contains an as yet unruled upon motion for certification of class, it appears that plaintiff is the only employee to have filed a claim within the time limitation of the Nevada statute. The others would be time barred. The proper comparison therefore would be between the assets of the estate and the pro-rata share of the corporation. There is no evidence indicating the inadequacy of the estate to cover this amount. The court concludes that defendant has not demonstrated he will be irreparably harmed.

The court also believes that the public interest will not be served by interceding in the state proceeding. Principles of federalism and comity long founded dictate against one sovereign interfering in the acts of another. Thus, for example, a federal court will not enjoin a state criminal prosecution until the state sovereign has acted. *Younger* v. *Harris*, 401 U.S. 37 (1971). Similarly, a federal court will abstain to avoid duplicating litigation already pending in state court. *Colorado River Water Cons. Dist.* v. *U.S.*, 424 U.S. 800 (1978).

The general rule regarding federal jurisdiction in probate matters and estate administration has been well-established to the effect that such probate proceedings are outside the power of the federal courts even where the requisite citizenship and amount in controversy have been established for purposes of diversity jurisdiction under 28 U.S.C. § 1332(a). *Rice* v. *Rice Foundation*, 610 F.2d 471, 475 (1979). The court there stated.

> Despite its long history and undisputed viability, the probate exception is not easily applied to particular cases. It is clear that "pure" probate matters are outside federal jurisdiction. *Waterman* v. *The Canal-Louisiana Bank & Trust Co.* 215 U.S. 33, 44, 30 S. Ct. 10, 54 L.Ed. 80 (1909); *Mitchell* v. *Nixon,* 200 F.2d 50, 51 (5th Cir. 1952).

Although it is clear that a federal court has no direct jurisdiction over probate actions, certain exceptions to the general rule apply where the matter does not involve "pure" probate concerns. *Rice, supra.* As indicated in *Bugbee* v. *Donahue,* 483 F. Supp. 1328 (1980), "if [a] dispute merely involves a claim between the parties and is enforcable in a state court of general jurisdiction, then a federal court sitting in diversity may take jurisdiction so long as it does not interfere with the local probate proceedings or assume general jurisdiction of probate or control of property in a state court's custody."

The court is not suggesting that abstention is proper here; no one has requested the court abstain. But the cases and the policies establish that the public interest favors *not* enjoining the state proceeding.

The denial of the temporary restraining order is not indicia that this court is ruling that it does not have jurisdiction in this case.

One of the grounds for invoking the jurisdiction of this court is based on diversity 28 U.S.C. 1332.

Plaintiff is concerned about the stock being obviated from being attained, attached or reached either by himself, or in the event a motion for class action under R.C. P. #23 is granted which would include fellow plaintiff employees to satisfy a first judgment on the merits. According to New Hampshire law this would not be so.

Reference is made to *In Re Estate of Thompson*, 118 N.H. 361 where the following question was certified to the New Hampshire Supreme Court and answered affirmatively.

> If the death tax is to be apportioned, may apportionment be enforced against an intervivos trust by way of in personam jurisdiction over one of the three trustees when the trust corpus and the two remaining trustees are located in Massachusetts?

The court opines that on the state of the pleadings now before it this court has jurisdiction.

The physical assets of the trust are the premises of the Union Leader Corporation in Manchester, New Hampshire. The present plaintiff is a resident of New Hampshire; most of the employees of the Union Leader Corporation are New Hampshire residents, witnesses are mainly from New Hampshire or the contiguous Commonwealth of Massachusetts.

Plaintiff's motion for a temporary restraining order is denied solely as to Probate Court proceedings in the State of Nevada without any prejudice to the proceedings in this court.

July 16, 1982

/s/ _____
Martin F. Loughlin
U.S. DISTRICT JUDGE

Alan P. Cleveland, Esq.
David L. Broderick, Esq.
Ralph W. Sullivan, Esq.

Appendix F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

RICHARD R. BERGERON,
Plaintiff

v.

ESTATE OF WILLIAM LOEB, THE WILLIAM LOEB UNION LEADER TRUST, NACKEY S. LOEB, (individually, as Executrix of The Estate of William Loeb, and as Trustee of The William Loeb Union Leader Trust), and the SECURITY NATIONAL BANK OF NEVADA
Defendants

CIVIL ACTION
NO. 82-317-L

CLASS ACTION
JURY TRIAL

MOTION TO AMEND COMPLAINT

NOW COMES the Plaintiff, and through his attorneys, moves to amend his complaint by adding the following additional prayer for relief at the end of Count I:

> In the alternative to an order for specific performance, impose a constructive trust upon the shares of the Union Leader Corporation stock in the hands of either the Security National Bank of Nevada or the William Loeb Union Leader Trust in favor of the employees of the Union Leader Corporation as of September 13, 1981, and order transfer of legal title of those shares to the employees in accordance with the terms of Mr. Loeb's promise.

Amend Count II by adding the following additional prayer for relief at the end of Count II:

> In the alternative to an order for specific performance, impose a constructive trust upon the shares of the Union Leader Corporation stock in the hands of either the Security National Bank of Nevada or the William Loeb Union Leader Trust in favor of the employees of the Union Leader Corporation as of September 13, 1981, and order transfer of legal title of those shares to the employees in accordance with the terms of Mr. Loeb's promise.

Amend Count III of the Complaint to add the following additional prayer for relief at the end of Count III:

> In the alternative to an order for specific performance, impose a constructive trust upon the shares of the Union Leader Corporation stock in the hands of either the Security National Bank of Nevada or the William Loeb Union Leader Trust in favor of the employees of the Union Leader Corporation as of September 13, 1981, and order transfer of legal title of those shares to the employees in accordance with the terms of Mr. Loeb's promise.

Amend Count IV of the Complaint to add the following additional prayer for relief at the end of Count IV:

> In the alternative to an order for specific performance, impose a constructive trust upon the shares of the Union Leader Corporation stock in the hands of either the Security National Bank of Nevada or the William Loeb Union Leader Trust in favor of the employees of the Union Leader Corporation as of September 13, 1981, and order transfer of legal title of those shares to the employees in accordance with the terms of Mr. Loeb's promise.

Amend Count V of the Complaint to add the following additional prayer for relief at the end of Count V:

> In the alternative to an order for specific performance, impose a constructive trust upon the shares of the Union Leader Corporation stock in the hands of either the Security National Bank of Nevada or the William Loeb Union Leader Trust in favor of the employees of the Union Leader Corporation as of September 13, 1981, and order transfer of legal title of those shares to the employees in accordance with the terms of Mr. Loeb's promise.

Respectfully submitted,

Richard R. Bergeron

By his attorneys,

SHEEHAN, PHINNEY, BASS & GREEN,
PROF. ASS'N

By: /s/_____
Michael C. Harvell

Dated: August 27, 1982

I hereby certify that a copy of the within Motion has this day been mailed, postage prepaid, to David L. Broderick, Esq., counsel for Defendant.

/s/ _____
Michael C. Harvell

hand delivered copy
8/27/82

Appendix G

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

NON-JURY ( )
JURY (X)

PRETRIAL ORDER

Number and Name of Case: C. 82-317-L, Richard R. Bergeron v. Estate of William Loeb, et al

Date of Pretrial Conference: August 30, 1982

Counsel Present: Michael Harvell, Esq., Susan Galvin, Esq., Donald A. Kennedy, Esq., and Ralph W. Sullivan, Esq.

Plaintiff's Theory of Liability: Plaintiff seeks specific performance of William Loeb's promise to bequeth stock in the Union Leader to the corporate employees.

Defendants' Theory of Defense: Mr. Loeb did exactly as he promised. Upon death of both he and his wife the stock would go into trust for benefit of the Union Leader's employees. All issues have been tried in *Mahoney* v. *Union Leader*.

Damages: Value of stock in the Union Leader Corporation.

Demand: That the defendant turn over the stock ownership of the Union Leader Corporation to its employees.

Offer: None

Settlement Possibilities: Poor

Third-Party Actions: None

Jurisdictional Questions: None

Motions: Plaintiff has filed motion for class action, and defendants intend to file motions for summary judgment. Plaintiff's Motion to Amend Complaint was granted.

Question of Law: None at this time.

DISCOVERY SCHEDULE

Dates for Disclosure of Experts and Rule 26(b)(4) Reports —
Plaintiff: 2/1/83 Defendant: 3/1/83

Completion of Discovery: June 1, 1983

Trial/_____: Call of the list for trial in the fall of 1983

Date: September 8, 1982 /s/_____
United States Magistrate

NOTE: Pretrial material will be submitted not later than 15 days after completion of discovery. The attention of counsel is directed to Local Rule 10 covering pretrial discovery and the pretrial material required. Objections to the Pretrial Order will be deemed waived unless made within 10 days hereof.

Appendix H

No. 81-10236
Dept. No. 9

Filed — 82 Sep 17 P1:42
JUDI BAILEY, CLERK
By /s/ B. Walker
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

In the Matter of the Estate
of
WILLIAM LOEB,
Deceased.

NACKEY S. LOEB, Executrix of the Estate of William Loeb, deceased,
Plaintiff
vs.
RICHARD R. BERGERON,
Defendant.

ORDER

This matter came before the Court on plaintiff's Petition for Declaration of Rights and for Judgment that Creditors Claim be Forever Barred. The Court having reviewed the Petition, opposition thereto, Points and Authorities, and after hearing oral argument on September 9, 1982, finds as follows:

Defendant has submitted to the jurisdiction of this Court. Plaintiff is entitled to a declaration of rights under the Uniform Declaratory Judgment Act.

By rejection of Richard R. Bergeron's claim by the Estate of William Loeb, defendant is bound to seek relief from said rejection in a proper Court. In this instance, the State of Nevada District Court. The suit must be brought within the time limit set forth in N.R.S. 147.030. That time limit is sixty days. Defendant filed suit in the United States District Court for the District of New Hampshire, sixty-three days after the notice of rejection. The Nevada State District Court has exclusive jurisdiction over the subject matter of the rejected claim. This Court does not purport to decide the jurisdiction of the United States District Court in this matter, but instead only finds today the Federal action brought in New Hampshire was not timely and was the improper forum to assert relief from the denial. Any relief now sought in this proceeding is barred.

It is the order of this Court that Richard R. Bergeron's claim against the Estate of William Loeb is barred.

Counsel for plaintiff is directed to prepare findings, conclusions of law and judgment in accordance with this Order.

DATED: This 17th day of September, 1982.

/s/_____

District Judge

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 17th day of September, 1982, she mailed a copy of the attached Order to the following:

Prince A. Hawkins, Esq.
Hawkins, Rhodes & Sharp
Attorneys at Law
P. O. Box 750
Reno, Nevada 89504

Dan C. Bowen, Esq.
Lionel, Sawyer & Collins
Attorneys at Law
P. O. Box 2610
Reno, Nevada 89505

/s/_____
Pamela Gullihur

Appendix I

No. 81-10236
Dept. No. 9

Filed — 82 Sep 29 P3:09
JUDI BAILEY, CLERK
By /s/ McKenzie
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

In the Matter of the Estate of WILLIAM LOEB, Deceased

FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT AND DECREE

NACKEY S. LOEB, Executrix of the Estate of William Loeb, Deceased,

Plaintiff

vs.

RICHARD R. BERGERON,

Defendant.

This matter came before the Court on plaintiff's Petition for Declaration of Rights, and for judgment that Creditor's Claim be forever barred;

Plaintiff Nackey S. Loeb appeared by Prince A. Hawkins, Esq., of Hawkins, Rhodes & Sharp, and defendant Richard R. Bergeron appeared by Dan C. Bowen, Esq., of Lionel, Sawyer & Collins; and

The Court having reviewed the Petition, Opposition thereto, Points and Authorities, and having duly considered the record and the evidence offered and received, and after hearing oral argument on September 1, 1982, entered its Order dated and filed September 17, 1982, that Richard R. Bergeron's Claim against the Estate of William Loeb, is barred; the Court makes its Findings of Fact, Conclusions of Law, and Judgment, as follows:

FINDINGS OF FACT

I.

William Loeb died September 13, 1981. At the time of his death he was, and since 1952 had been, a resident and domiciliary of the State of Nevada. His Will was admitted to probate by this Court on December 10, 1981, and Nackey S. Loeb was appointed, and continues to be, Executrix thereof.

II.

Richard R. Bergeron filed a verified Creditor's Claim in this Court against the Estate of William Loeb, and Nackey S. Loeb as Executrix thereof. The Claim was sworn to March 16, 1982, and was filed March 17, 1982, and a certified copy of the Claim was admitted in evidence as plaintiff's EXHIBIT A.

III.

The claim alleges that the deceased, William Loeb, was the sole owner and shareholder of the Union Leader Corporation, and had stated that upon his death, ownership of the company would be divided equally among, and devised to, its then-employees, who were such as of his death. The claim demands a per capita pro rata share of the company, or its cash equivalent, as a creditor of the estate.

IV.

The claim was rejected by the Executrix March 28, 1982. The Rejection and Notice of Rejection were filed with the Clerk of this court April 5, 1982. A copy of the Rejection and Notice of Rejection was mailed to Richard R. Bergeron by certified mail April 5, 1982, addressed to him, RFD 2, Danis Park Road, Goffstown, New Hampshire 03045. A certified copy of the Rejection of Claim April 5, 1982, and of the Affidavit of Mailing thereof, was admitted in evidence as plaintiff's EXHIBIT F.

V.

No suit was brought upon the rejected Claim in the State of Nevada. A suit was brought by Richard R. Bergeron against the Estate of William Loeb, The William Loeb Union Leader Trust, and the Security National Bank of Nevada, in the State of New Hampshire, in its Federal District Court, on June 7, 1982, 63 days after Notice of Rejection of the Claim was mailed to Bergeron. It seeks, among other things, the relief sought in the Creditor's Claim here. A certified copy of the Complaint was admitted in evidence as plaintiff's EXHIBIT B;

attached to that Complaint are copies of the Creditor's Claim and Notice of Rejection of the Claim.

VI.

Following the filing of the Petition and Complaint herein, and pursuant to Order of this Court, a Citation was issued to Richard R. Bergeron to appear July 20, 1982, and show cause why judgment should not be entered that his Claim against the Estate of William Loeb was barred. The Citation and Petition were personally served upon Richard R. Bergeron in the State of New Hampshire on June 25, 1982. Richard R. Bergeron entered a general appearance herein on July 20, 1982, through his attorneys, Lionel, Sawyer & Collins.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter of the action, and of the parties; Richard R. Bergeron has submitted himself to the jurisdiction of this Court by filing his Creditor's Claim herein, and has entered his general appearance by counsel, in this proceeding.

II.

The plaintiff is entitled to a declaration of rights under the Uniform Declaratory Judgments Act as adopted by the State of Nevada, to determine whether or not the Claim filed by Richard R. Bergeron is forever barred.

III.

Upon rejection of Richard R. Bergeron's claim by the Estate of William Loeb, defendant Bergeron is bound to seek relief from said rejection in accordance with the provisions of NRS 147.130, which requires that suit be brought within 60 days in the proper court.

IV.

The proper court in which the suit must be brought is, as a matter of statutory construction and substantive law, the State of Nevada District Court. The Nevada State District Court has exclusive jurisdiction over the subject matter of the rejected claim. The suit brought by Richard R. Bergeron upon his rejected claim in the Federal District Court for the State of New Hampshire was not brought in the proper court as required by NRS 147.130. Richard R. Bergeron's claim is therefore forever barred.

V.

The time limit within which suit must be brought is 60 days from the date of mailing of the Notice of Rejection. Bergeron's suit in New Hampshire was brought 63 days after the date of mailing. The 60-day period prescribed by NRS 147.130 is not extended by NRCP 6(e). Richard R. Bergeron's claim is therefore forever barred, and would be barred even if filed in Nevada District Court.

VI.

This Court does not purport to decide the jurisdiction of the United States District Court for the District of New Hampshire,

but determines the federal action brought in New Hampshire was not timely, and was the improper forum to assert relief from the denial.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Claim of Richard R. Bergeron against the Estate of William Loeb, and Nackey S. Loeb, Executrix of the Estate of William Loeb, is forever barred; Richard R. Bergeron is entitled to nothing from the Estate of William Loeb.

Dated, this 28 day of September, 1982.

/s/_____
District Judge.

Appendix J

100 Nev., Advance Opinion 7

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD R. BERGERON, APPELLANT, v. NACKEY S. LOEB, EXECUTRIX OF THE ESTATE OF WILLIAM LOEB, DECEASED, RESPONDENT.

No. 14465

January 25, 1984

Appeal from a declaratory judgment by the Second Judicial District Court, Washoe County; Robert L. Schouweiler, Judge.

Affirmed.

Lionel Sawyer & Collins, Reno, for Appellant.

Hawkins, Rhodes & Sharp, Reno, for Respondent.

OPINION

Per Curiam:

This is an appeal from the district court's declaratory judgment in favor of respondent, Nackey S. Loeb, Executrix, and against appellant, Richard R. Bergeron, who claims an interest in the Estate of William Loeb, Deceased. There is no dispute as to the Nevada district court's jurisdiction over the state proceeding. The lower court simply held that appellant's claim against the estate was forever barred because he had failed to file the claim in the proper court within the time limit as required by NRS 147.130(1).[1] Although appellant had filed his claim within the requisite 60 day period, the filing occurred in the federal district court for New Hampshire.

The sole issue addressed is whether the district court erred in interpreting NRS 147.130(1) as barring with prejudice the

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[1]NRS 147.130(1) provides:

> When a claim is rejected by the executor or administrator or the district judge, in whole or in part, the holder shall be immediately notified by the executor or administrator, and the holder must bring suit in the proper court against the executor or administrator within 60 days after such notice, whether the claim is due or not; otherwise the claim shall be forever barred. If the holder of a claim resides out of the county, he may be informed of the rejection of his claim by written notice forwarded to his post office address by registered or certified mail.

appellant's claim against the estate. We turn to consider the propriety of that determination.

NRS 147.130(1) essentially provides that suits against the estates of Nevada domiciliaries which are not filed in the proper court within 60 days of their rejection by the administrator of the estate are forever barred. We must decide, then, what the legislature intended when it used the phrase "the proper court."

Appellant contends that the language "the proper court" denotes any court having subject matter jurisdiction over the matter in controversy. He concludes, therefore, that the federal district court has the requisite jurisdiction. Respondent, on the other hand, argues that Nevada's strong policy favoring expeditious settlement and distribution of decedents' estates would be frustrated if suit on a rejected claim was permitted in any court having subject matter jurisdiction of the action. Respondent then concludes by urging that in instances such as the one now before the court, the Nevada state district court is the proper court to exercise sole jurisdiction over the estate assets. We agree with respondent.

In Welfare Div. v. Washoe Co. Welfare Dep't, we stated:

> The leading rule for the construction of statutes is to ascertain the intention of the legislature in enacting the statute. . . . The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The entire subject matter and the policy of the law may also be involved to aid in its interpretation. . . . (Citations omitted.)

88 Nev. 635, 637-38, 503 P.2d 457, 458-59 (1972).

NRS 147.130(1) is part of Title 12 of the Nevada Revised Statutes, relating to Wills and Estates of Deceased Persons. The entire statutory scheme set out in Title 12 demonstrates an intention on the part of the legislature to ensure the speedy and certain distribution of decedents' estates. For example, NRS 143.035 requires that an executor or administrator use reasonable diligence in administering an estate. It further requires him to file a report with the court explaining why the estate has not been closed within six months of his appointment if no federal tax return need be filed for the estate, and within eighteen months if a tax return is required. Subsection 4(c) of this statute provides for revocation of the letters of an executor or administrator who has not used reasonable diligence in the administration of an estate. In addition, NRS 147.040 provides that claims against a decedent must be filed within ninety days after the first publication of notice or be forever barred; and

NRS Chapter 145 generally provides for the summary administration of smaller estates. As we stated in Gardner Hotel Supply v. Estate of Clark, 83 Nev. 388, 391, 432 P.2d 495, 497 (1967): "The spirit and letter of Nevada statutes relating to the filing of claims and administration of estates speak to the policy of our laws that efficient and expedient administration is essential."

This is consistent with policy in other states respecting probate matters. *See, e.g.*, Wittick v. Miles, 545 P.2d 121, 126 (Or. 1976), in which the Supreme Court of Oregon stated that "[t]he purpose of the probate code is to facilitate prompt and economic administration of estates" and LoSasso v. Braun, 386 P.2d 630, 632 (Wyo. 1963), where it was noted that "the object of probate proceedings . . . is to wind up the affairs of a decedent in an orderly manner and to make distribution of assets remaining to persons entitled as speedily as is practicable." *See also* California Probate Code § 714 which also provides a shortened limitation period for the filing of rejected claims against an estate. The holder of such a claim must bring suit "within three months after notice of rejection if the claim is then due or if not, within two months after it becomes due; otherwise the claim shall be forever barred."

If appellant is correct that the legislature intended to allow suit to be brought in any court arguably possessing subject matter jurisdiction, then NRS 147.130(1) would be inconsistent with the remainder of the statutory scheme and with the pronounced policy of this, and other states, supporting the speedy resolution of probate proceedings. It is difficult to conceive of a less efficient method of administering an estate than to require the Nevada district court having jurisdiction over the assets of an estate to await the final adjudications, including appeals, of any number of other courts that may be considering matters which could materially and adversely affect Nevada's established authority to proceed.

This construction of NRS 147.130(1) is further supported by the fact that probate in Nevada is in the nature of an "in rem" proceeding. In an action in rem, the court acquires jurisdiction over the estate and all persons for the purpose of determining their rights to any portion of the estate. When proper notice has been given, the action of the probate court is conclusive as to all creditors and others interested in the estate. Monk v. Morgan, 192 P. 1042, 1044 (Cal.App. 1920), In re Estate of Seeger, 493 P.2d 281 (Kan. 1972). Bancroft's Probate Practice, §§ 40, 61 (2d ed. 1950). In addition, a court, state or federal, which first assumes jurisdiction of property is entitled to maintain and exercise its jurisdiction, to the exclusion of any other court, even to the point of enjoining proceedings in the other

court. In Kline v. Burke Const. Co., 260 U.S. 226, 229 (1922), the court stated:

> It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is *in rem* the effect is to draw to the federal court the possession or control, actual or potential, of the *res*, and the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction.

In the instant case, the assets of the Loeb estate, in which appellant claims an interest, have been and remain under the jurisdiction of the Nevada district court. In addition, the trust, upon which appellant seeks to impose an equitable claim, was established and is being administered under the auspices of this same court. The assets of this trust are some 3,750 shares of Union Leader Corporation stock, registered in the name of William Loeb, the decedent. The legal situs of these shares is Nevada, where the stock certificates are located and the trust is being administered. Certificates of stock are the physical representation of the stock and the court's possession of the certificates gives jurisdiction over the stock. The situs of the shares is the situs of the certificates. Haughey v. Haughey, 9 N.W.2d 575 (Mich. 1943). *Accord,* In re De Lano's Estate, 315 P.2d 611 (Kan. 1957). This administration of the decedent's estate and trust is in conformity with NRS 136.010 which gives exclusive jurisdiction of the settlement of estates to the district court of the county in which the deceased was a resident at the time of death. Appellant's action in federal district court in New Hampshire essentially petitions that court to determine the ownership of the trust res which is under the jurisdiction of the Nevada district court.

It is well established that "federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims'. . . ." Markham v. Allen, 326 U.S. 490, 494 (1945), *rev'd in part on other grounds, sub nom,* Clark v. Allen, 331 U.S. 503 (1946). This is an exception to the general denial of diversity jurisdiction as to probate matters. The

exception applies, however, only "so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.*

Here, it is abundantly clear that having another court determine the ownership of a major asset of the Loeb estate would seriously interfere with the Nevada state probate proceedings and necessitate assumption by it of control over property now in the custody of the Nevada district court. Although we cannot, and do not, decide the propriety of the New Hampshire federal court's exercise of jurisdiction, we do conclude that appellant's action was not brought in "the proper court" as required by NRS 147.130(1).

Accordingly, we affirm the judgment of the district court.

MANOUKIAN, C. J.
SPRINGER, J.
MOWBRAY, J.
STEFFEN, J.
GUNDERSON, J.

NOTE—These printed advance opinions are mailed out immediately as a service to members of the bench and bar. They are subject to modification or withdrawal possibly resulting from petitions for rehearing. Any such action taken by the court will be noted on subsequent advance sheets.

This opinion is subject to formal revision before publication in the preliminary print of the Pacific Reports. Readers are requested to notify the Clerk, Supreme Court of Nevada, Carson City, Nevada 89710, of any typographical or other formal errors in order that corrections may be made before the preliminary print goes to press.

JUDITH FOUNTAIN, *Clerk.*

Appendix K

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD R. BERGERON,
Appellant,

vs.

NACKEY S. LOEB, Executrix of the Estate of William Loeb, Deceased,
Respondent.

No. 14465

FILED
OCT 4 1984
/s/Judith Fountain
CLERK OF SUPREME COURT

ORDER DENYING REHEARING

Appellant has petitioned this court for a rehearing of our opinion in this matter affirming the declaratory judgment of the district court. *See* Bergeron v. Loeb, 100 Nev. 54, 675 P.2d 397 (1984). In affirming the district court's judgment, we held that appellant's claim against the respondent estate, which was filed in a New Hampshire federal court instead of the Nevada state court involved in the probate of the estate, was forever barred from assertion in Nevada because appellant failed to file the claim "in the proper court" within the meaning of NRS 147.130(1).[1] Bergeron suggests that serious doubt

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[1] NRS 147.130(1), at all material times to this litigation, provided:

When a claim is rejected by the executor or administrator or the district judge, in whole or in part, the holder shall be immediately notified by the executor or administrator, and the holder must bring suit in the proper court against the executor or administrator within 60 days after such notice, whether the claim is due or not; otherwise the claim shall be forever barred. If the holder of a claim resides out of the county, he may be informed of the rejection of his claim by written notice forwarded to his post office address by registered or certified mail.

exists as to the correctness of our decision, and that we should therefore grant a rehearing. In particular, Bergeron contends that our construction of NRS 147.130(1) unconstitutionally divests the federal courts of their concurrent jurisdiction in diversity cases and extinguishes those causes of action, such as antitrust or federal securities claims, that can only be brought in federal court. Bergeron now argues, for the first time, that his New Hampshire suit contains a claim against the respondent estate for a violation of the Securities Act of 1934, 15 U.S.C. § 78aa, "which would presumably be extinguished by this court's decision."

Appellant's first contention above, that this court's decision and interpretation of the phrase "in the proper court" divests the federal courts of their concurrent jurisdiction, was previously presented to us in the opening brief and at oral arguments. Our opinion specifically acknowledged that federal courts have concurrent jurisdiction over suits brought by creditors and other claimants against a decedent's estate to establish their claims so long as the federal court proceedings do not interfere with the state probate proceedings. *Id.* at 59, 675 P.2d at 401. *See also* Markham v. Allen, 326 U.S. 490, 494 (1945), *rev'd in part on other grounds, sub nom,* Clark v. Allen, 331 U.S. 503 (1946). We simply determined that, under the circumstances of this case and as a matter of policy, the Nevada state district court was the *proper*, more appropriate court for bringing suit on the claim under NRS 147.130(1). We therefore deny rehearing on this ground. NRAP 40(c)(1).

Appellant's second contention above, that our decision has the effect of extinguishing causes of action that can only be brought in federal court, is raised for the first time in this petition for rehearing. NRAP 40(c)(1) specifically precludes a party from raising a new point, for the first time, in a petition for rehearing. Furthermore, appellant's recent contention, that his New Hampshire suit involves a federal securities claim

which can only be brought in federal court, directly contradicts the position asserted in his opening brief. In his opening brief appellant conceded that the federal and state courts have *concurrent* jurisdiction over his suit to establish a claim against the estate. Finally, our review of the record in this matter reveals that appellant also failed to present this argument to the district court.

We decided this appeal based upon the arguments and authorities presented by the parties in their briefs and at oral argument, and upon the authorities we discovered through our own independent research. Appellant did not present this argument regarding the extinguishment of certain federal causes of action in his brief or at oral argument, and his petition for rehearing in this regard rests largely upon citations not found in the briefs originally submitted by the parties.

As we noted in Stanfill v. State, 99 Nev. 499, 501, 665 P.2d 1146, 1147 (1983), "[t]he purpose of briefing and oral argument is to inform this court of all authorities relevant to the issues raised in the appeal. On the other hand, the primary purpose of a petition for rehearing is to inform this court that we have misread or misunderstood a statute, case or fact in the record. A party may not raise a new point for the first time on rehearing."

Because appellant's second contention above was not properly made in the first instance, we will not consider it now on rehearing. If we are confronted with this issue in the future, in a properly briefed case, a reconsideration of the issue might be appropriate.

Accordingly, we hereby deny rehearing.
It is so ORDERED.

/s/_____, C.J.
Manoukian

/s/_____, J.
Springer

/s/_____, J.
Mowbray

/s/_____, J.
Steffen

/s/_____, J.
Gunderson

cc: Hon. Robert L. Schouweiler, District Judge
Lionel, Sawyer & Collins
Hawkins, Rhodes & Sharp
Judi Bailey, Clerk

Appendix L

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
FEDERAL BUILDING
CONCORD, NEW HAMPSHIRE 03301

OFFICE OF THE CLERK
P.O. Box 1498

TELEPHONE 228-0506
AREA CODE 603

DATE: October 12, 1984
IN RE: 82-317-L, Bergeron v. Loeb, et al.

Received Oct 15 1984
Malloy & Sullivan

The following orders were made on 10/12/84

( ) by Chief Judge Devine
(X) by Judge Loughlin
( ) by Magistrate Barry

On defendant's motion to dismiss, motion granted. On motion for summary judgment, motion granted.

TO: Malloy & Sullivan, Manchester & Hingham, Ma.
Alan P. Cleveland, Esq.

Appendix M

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW HAMPSHIRE

Filed Oct 12 12:39 PM '84

Richard R. Bergeron

v. Civil Action No. 82-317-L

Estate of William Loeb
The William Loeb Union Leader Trust
Nackey S. Loeb, individually as
Executrix of the Estate of William
Loeb, and as Trustee of The William Loeb
Union Leader Trust and the
Security National Bank of Nevada

J U D G M E N T

In accordance with the granting of Defendants' Motion To Dismiss and Motion For Summary Judgment on October 12, 1984 by the Honorable Martin F. Loughlin, United States District Judge, judgment is hereby entered.

By the Court,

/s/_____
Kathleen Northrup
Clerk

October 12, 1984
cc: Alan P. Cleveland, Esq.
Ralph Warren Sullivan, Esq.

Appendix N

THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW HAMPSHIRE

Richard R. Bergeron, et al.

v. #C82-317-L

Estate of William Loeb, et al.

ORDER ON MOTION FOR CLARIFICATION

The United States District Court for the District of New Hampshire granted defendants' motions to dismiss and summary judgment on October 12, 1984. The plaintiffs' motion for reconsideration and oral motion to hold in abeyance are denied. The motion for clarification is granted.

William Loeb died on September 13, 1981. Nackey S. Loeb, his wife, was appointed executrix of his estate and trustee of the "Union Leader Trust" (trust) pursuant to the probate by the State of Nevada.

Under Nevada probate procedures, a general claim was made by the plaintiff class against the estate and trust which involved 3,750 shares of the Union Leader Corporation stock (the securities). These shares of stock were under the jurisdiction and possession of a Nevada probate court.

Nackey Loeb rejected the claim on April 5, 1982. Rather than following the procedures of Nevada to request a hearing before the probate court, the plaintiffs instigated suit on June 7, 1982 in this district court, referred to as the federal court.

The suit was certified as a class action on behalf of willing employees of the Union Leader Corporation as of September 13, 1981.

The complaint is summarized as follows:

Count I alleges fraudulent conduct on the part of all defendants in the purchase and sale of the Union Leader Corporation securities by means of interstate commerce. The conduct violates the Security Exchange Act of 1934, as amended (the "Exchange Act"), 15 U.S.C. §§ 78 et seq., and Rule 10(b). As such, the court has jurisdiction under 28 U.S.C. § 1331.

Count II alleges a breach of common law contract in the failure by the defendants to perform an agreement to transfer the ownership of the securities upon the death of William Loeb.

Count III alleges a violation of the New Hampshire Uniform Fraudulent Conveyance Act, RSA 545:1 upon the *inter vivios* transfer of the securities to the trust on August 17, 1979.

Count IV alleges the pledge of the securities to the Security National Bank (SNB) on August 25, 1980 was a fraudulent conveyance and that the Bank was a party to the fraud.

Count V alleges that Massachusetts law and not the Nevada community property rules applied, that the Second Amendment to the trust was invalid, that the amendment was made to defraud the employee-creditors and that the execution of the amendment was therefore a fraudulent conveyance of a half interest in the securities to Nackey Loeb.

Counts II through V are properly before the court there being diversity of citizenship among the parties. 28 U.S.C. § 1332. The plaintiff also seeks a declaration of rights. 28 U.S.C. § 2201 et seq.

After this court received the complaint, Nackey Loeb filed a "Petition for Declaration of Rights and for Judgment that Creditors' Claim is Barred" in the Second Judicial Court in the State of Nevada in and for the County of Washoe (Nevada Court). The defendant there, Plaintiff Bergeron, et al here, submitted to the jurisdiction of the Nevada court and answered the complaint on June 28, 1982. As a result of that action, the Nevada court rules that the same claim as made in this fed-

eral court was forever barred. The Nevada Supreme Court affirmed the Nevada District Court. *Bergeron* v. *Loeb*, Slip opinion No. 14465. (Nev. January 25, 1984), reh. denied, October, 1984.

In light of the Nevada final judgment on October 4, 1984, this court granted defendants' motion to dismiss based upon the abstention doctrine. This court also granted defendant's motion for summary judgment on the "Exchange Act" count I of the complaint, (Order dated October 12, 1984). This court had held the matter in abeyance pending the request for rehearing pending before the Nevada Supreme Court from June 16, 1984.

The claims set forth in Counts II, III, IV and V are ones which this court had concurrent jurisdiction with the Nevada courts' proceedings.

The United States Supreme Court has recently reaffirmed the discretionary power of the district courts to dismiss an action to avoid concurrent jurisdiction which would conflict with comity. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation*, 460 U.S. 1, (1983); *Moses H. Cone, Meredith* v. *City of Winter Haven*, 320 U.S. 228, 234 (1943).

Under the so-called exceptional circumstances test,

> [t]he decision whether to dismiss a federal action because of parallel state court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.

Moses H. Cone, Supra, at 16. Upon a balancing of the factors, the court finds several grounds which favor the application of abstention.

The allegation contained in plaintiff counts II, III, IV and V are claims which were litigated or which could have been litigated by affirmative defenses or cross claims in the Nevada "Declaration of Rights" proceedings. As of the date of this order, a final judgment has been rendered by the Nevada Supreme Court. *Bergeron* v. *Loeb, supra.*

> The declaratory judgment entered by the state chancery court has the force and effect of a final judgment and is binding upon the parties in subsequent actions.

Continental Insurance Company v. *South Jersey Gas Co.*, 409 F. Supp. 1130, 1132 (D.N.J. 1976).

If a Writ of Certiorari to the United States Supreme Court is not brought, is denied, or is affirmed, the Nevada decision would have a *res judicata* effect on this court.

> The outlines of the rule are clearly set forth in *Commissioner* v. *Sunnen*, 333 U.S. 591, 68 S. Ct. 715, 92 L.Ed. 898 (1947):
>
> > The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. (Citations omitted)

Walsh v. *International Longshoreman's Ass., AFL-CIO*, 630 F.2d 864, 867 (1st Cir. 1980). That judgment states that the creditor's claim by Bergeron is forever barred against the estate and trust. Thus, if the decision is respected by this federal court, the claims are moot.

In light of the likelihood that the issues before the court are moot, the continued exercise of jurisdiction would waste judicial resources. *Moses H. Cone, supra.*

If this court does give *res judicata* effect to the Nevada judgment, this action would cause piecemeal adjudication of the rights to the estate and trust of William Loeb. *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), (*Colorado River*). Probate and trust administrations are fields which are "peculiarly appropriate for comprehensive treatment in the forums having the greatest experience and expertise". *Id.* at 819-20. Piecemeal adjudication should be avoided here.

The continued exercise of concurrent jurisdiction would substantially interfere with the strong state policy in the orderly administration of estate and trusts. *Markham* v. *Allen*, 326 U.S. 490 (1945); *Waterman, supra*; *Buck* v. *Hales*, 536 F.2d, 1330 (10th Cir. 1976), (administration of a trust). The pending suit would affect the bulk of the assets of the estate and the entire corpus of the trust. Count V contests the validity of a trust instrument and choice of law selected by the Nevada courts. Clearly, the federal suit amounts to an examination of the general administration of estates and trusts by the Nevada courts which this court declines to do. *See, Kittrege* v. *Stevens*, 126 F.2d 263, (1st Cir. 1942).

The exercise of federal review would also disrupt the Nevada efforts to establish a coherent public policy on the definition of a "proper court" for filing probate claims. *Bergeron* v. *Loeb, supra*; *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

The conflicts with comity and avoidance of piecemeal litigation are not avoided if this court restricts its judgment to a declaration of rights. Where a prayer for injunctive relief is not premature, claims pursuant to the Declaratory Judgment Act are decided by the same standards as those for claims based on diversity of citizenship. *PBG Industries, Inc.* v. *Con-*

tinental Oil Co., 478 F.2d 674, 679 (5th Cir. 1973). As an injunction is not premature and the issues of the case are ripe, the court may properly abstain.

The court now turns to count I of the complaint. Abstention does not apply because the federal courts have exclusive jurisdiction of Security Exchange Act claims. 15 U.S.C. § 78 aa. A review of the pleadings, affidavits and all other papers filed with the court indicate the following facts and reasonable inferences in a light most favorable to the non-moving party. *Pignons S.A. de Mecqnique de Precision* v. *Polaroid Corporation*, 657 F.2d 482, 486 (1st Cir. 1981).

On April 29, 1949 William Loeb was the sole owner of 5,000 shares of Union Leader Corporation stock (Corporation), representing the entire authorized and issued capital stock of the Corporation.

In 1949 William Loeb started the cash profit-sharing plan covering the Corporation employees. The plan provided for 50% of the Corporation's profits before taxes to be annually distributed among the employees.

On September 26, 1956 William Loeb created the retirement profit sharing plan and trust for the benefit of employees (called deferred profit sharing plan).

On September 30, 1956 through July 17, 1960 William Loeb sold 1,250 shares of corporation stock to the deferred profit sharing plan for $375,000 in cash from the plan.

In 1957 William Loeb founded the *Haverhill Journal*. The employees agree to Loeb's request to terminate the 1949 cash profit sharing plan. Between 1949 and 1957 the employees received $696,472.81 from this plan. In exchange Loeb promised the employees that they would receive ownership of the Corporation upon his death. Loeb reaffirmed this promise of Corporate ownership when he extracted promises of loyalty, forebearance from seeking overtime pay, higher wages and compensation and benefits from the employees during the Haverhill venture.

In 1959 William Loeb retroactively deleted the mandatory payment contributions in the deferred profit sharing plan and stopped payments. Between 1956-1957 the plan accumulated $270,000 in the employees' individual accounts. Loeb told the employees this money would be returned to them when they received ownership of the Corporation because every $1.00 used to finance the Haverhill paper, rather than being put into the deferred profit sharing plan could be expected to increase $40.00 in value.

On May 1, 1959 William Loeb pledged to Alexander R. Cymrot a Director of the Corporation, all Corporation stock held in Loeb's name as collateral for a $300,000 loan. An additional borrowing of $200,000 by the Corporation from Cymrot is evidenced by loan agreements dated June 1, 1959 and June 1, 1960.

On April 8, 1963 William Loeb borrowed $500,000 from the Teamsters Central States, Southeast and Southwest Areas Pension Fund (Teamsters) to repay Cymrot. Loeb pledged 3,750 shares of the Corporation owned by him and not held in trust by the deferred profit sharing plan.

June 25, 1965, William Loeb borrowed $2,000,000 from the Teamsters to repay the 1963 loan. Loeb pledged all Corporation stock held by him as shareholder of record.

On March 7, 1979 the Corporation borrowed $900,000 from the Security National Bank of Nevada (SNB) to pay the 1965 Teamsters loan. William Loeb regained possession of the 3,750 shares of Corporation stock.

On August 17, 1979 William Loeb created the William Loeb Union Leader Trust (Trust). Nackey Loeb was appointed sole trustee. Ten successor trustees were also appointed and after the death of the next to last survivor of the successor trustees the employees will receive ownership of the Corporation. William Loeb transferred all his 3,750 shares to the Trust.

On August 25, 1980 William and Nackey Loeb and the Trust pledged the 3,750 shares to SNB for a $2,000,000 loan.

This money was used to buy 1,250 shares of Corporation held by Augsbury Organization, Inc. Upon receipt of the 1,250 shares they were retired by Loeb as Treasury stock.

On September 13, 1981 William Loeb died. Since May 1, 1959 until this date, excluding August 17, 1979 — August 25, 1980 all 3,750 shares shares of Corporation stock held by William Loeb remained pledged and were physically possessed by third party creditors and/or the Corporation.

September 13, 1981 the trust pledged 3,750 shares of Corporation stock to SNB.

The standard for summary judgment utilized in the First Circuit is derived from *Astra Pharmaceutical Corp.* v. *Beckman Instruments, Inc.*, 718 F.2d 1201, 1204 (1st Cir. 1983) If the pleadings depositions, answer to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Pignons S.A. de Mecanique de Precision* v. *Polaroid Corporation*, 657 F.2d 482, 486 (1st Cir. 1981). A dispute of fact is material if it "affects the outcome of the litigation" and is "genuine if manifested by substantial evidence going beyond the allegations of the complaint. *Pignons* 657 F.2d at 486, *Hahn* v. *Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904, 96 S. Ct. 1495, 47 L.Ed.2d 54 (1976).

In order to maintain an action under Section 10(b) of the Exchange Act, 15 U.S.C. § 78 (aa) as amended, Rule 10 b-5 and 17 C.F.R. § 240.106-5, the plaintiff must demonstrate that the fraud alleged was directly associated with a "purchase or sale of securities". *Rodriguez Cadiz* v. *Mercado Jimenez*, 579 F. Supp. 1176, 1179-80 (D.P.R., 1983).

The plaintiff alleges that the class of employees were beneficiaries of a constructive trust or that they were entitled to specific performance of an oral promise to deliver ownership of the shares in question upon the death of William Loeb. By

analogy, the employees would be in the same position as employees under a formal, non-contributory compulsory pension plan or employee stock ownership plan. In either case, the employer-manager would owe a duty to the employees according to the terms of the agreement. See 56 C.J.S. § 169.

The law is well-established that the Exchange Act does not apply to non-contributory, compulsory pension plans, or to employee stock ownership plans. Generally, the courts have found that there is no affirmative investment decision and no furnishing of "value" by the employees. *Bauman* v. *Bish*, 571 F. Supp. 1054, 1064 (N.D. W. Va., 1983). The United States Supreme Court stated in *International Brotherhood of Teamsters* v. *Dainel*, 439 U.S. 551, 560 (1979) that the establishing of a right to the stocks by the faithful service of employees is not a "purchase or sale." The court said:

> Only in the most abstract sense may it be said that an employee "exchanges" some portion of his labor in return for these possible benefits. He surrenders his labor as a whole, and in return receives a compensation package that is substantially devoid of aspects resembling a security. An employee is selling his labor primarily to obtain a livelihood, not making an investment. 439 U.S. at 560.

439 U.S. at 560.

The plaintiff's claim against the defendants concerning the use of the stock as collateral for a loan from the Security National Bank of Nevada (SNB) and the Teamster loans must also fail because there was no violation of the Securities Act in those transactions.

> The purpose of § 10(b) and Rule 10b-6 is to protect persons who are deceived in securities transactions — to make sure that buyers of securities get what they think

> they are getting and that sellers of securities are not tricked into parting with something for a price known to the buyer to be inadequate or for a consideration known to the buyer not to be what it purports to be . . . The Act and Rule impose liability or a proscribed act in connection with the purchase or sale of a security; it is not sufficient to allege that a defendant has committed a proscribed act in a transaction of which the pledge of a security is a part.

Chemical Bank v. *Arthur Anderson & Co.*, 726 F.2d 930, 943 (2nd Cir. 1984). There is no evidence that SNB or the Teamsters were defrauded because the equitable lien in favor of the employees was not disclosed, in which case only SNB and the Teamsters would have standing as an aggrieved party. *Wright* v. *Heizer Corporation*, 411 F. Supp. 23, 31-33 (N.D. Ill. E.D., 1975).

The Securities Acts were not intended to be vehicles for attacking fraudulent mismanagement of corporate affairs, a pension plan or trust, but rather were established to protect defrauded purchasers and sellers of securities. *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (2nd Cir. 1952); *cert. denied* 343 U.S. 945 (1952). The 1979 transfer of shares to the William Loeb Union Leader Trust would amount to fraudulent mismanagement because the shares were placed in an irrevocable trust contrary to the original alleged agreement conferring the corporation's ownership to the employees until William Loeb's death. The existence of the trust virtually places corporate ownership out of plaintiff's reach and similarly situated employees' reach. However, even granting that this is mismanagement of a trust, the fraudulent transfer is not a purchase or sale and does not qualify as a cause of action under the Securities Act.

The motion to dismiss shall stand for the counts II through V based upon abstention. Upon a careful review of facts and

allegations connected with Count I under the "Exchange Act", motion for summary judgment in favor of the defendant remains.

So Ordered.

December 11, 1984

/s/_____
Martin F. Loughlin
U.S. District Judge

Alan P. Cleveland, Esq.
Ralph Warren Sullivan, Esq.

Appendix O

Supreme Court of the United States

No. 84-934

Filed
Feb 26 1985
CLERK OF SUPREME COURT
by /s/ _____
DEPUTY CLERK

Richard R. Bergeron,
Petitioner

v.

Nackey S. Loeb, Executrix of the Estate of
William Loeb

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Nevada, No. 14465.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Supreme Court of Nevada.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

February 19, 1985

Justice Powell took no part in the consideration or decision of this petition.

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.
DATE: February 28, 1985
JUDITH FOUNTAIN, Supreme Court Clerk,
State of Nevada
By /s/ Joanne C. Richards Deputy

A true copy ALEXANDER L. STEVAS
Test:
Clerk of the Supreme Court of the
United States
By /s/_____
Deputy

Appendix P

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
FEDERAL BUILDING
CONCORD, NEW HAMPSHIRE 03301

OFFICE OF THE CLERK
P.O. Box 1498

TELEPHONE 228-0506
AREA CODE 603

DATE: Feb. 27, 1985
IN RE: 82-317-L, Bergeron v. Loeb

The following order was made on 2/27/85

( ) by Chief Judge Devine
(X) by Judge Loughlin
( ) by Magistrate Barry
( ) by Clerk Starr

On motion to stay entry of judgment, stay removed, judgment for defendant.

TO: Ralph Warren Sullivan, Esq.
Michael C. Harvell, Esq.

Appendix Q

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1340.

RICHARD R. BERGERON,
Plaintiff, Appellant,

v.

ESTATE OF WILLIAM LOEB, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: November 20, 1985

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed in part, vacated in part and the cause is remanded to the District Court for further proceedings consistent with the opinion filed this day.

No Costs.

By the Court:
FRANCIS P. SCIGLIANO, CLERK
By: /s/ Janice M. O'Neil
Supervisory Deputy

Appendix R

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1340.

RICHARD R. BERGERON,
Plaintiff, Appellant,
v.
ESTATE OF WILLIAM LOEB, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Martin F. Loughlin, *U.S. District Judge]*

Before

Campbell, Chief Judge,
Aldrich and Torruella, *Circuit Judges.*

Michael C. Harvell with whom *Mark F. Weaver* and *Sheehan, Phinney, Bass & Green Professional Association,* were on brief for appellant.

Ralph Warren Sullivan with whom *Gregory V. Sullivan, L. Michael Hankes, Malloy & Sullivan* and *Lawyers Professional Corporation* were on brief for appellees.

November 20, 1985

CAMPBELL, *Chief Judge*. Plaintiff-appellant Richard R. Bergeron appeals from a decision and order of the United States District Court for the District of New Hampshire granting defendants-appellees' motions to dismiss his complaint and for summary judgment. We affirm in part, reverse in part, and remand.

BACKGROUND

Plaintiff-appellant Richard R. Bergeron, a New Hampshire resident, is employed by the Union Leader Corporation, which publishes New Hampshire's largest newspaper, the *Manchester Union Leader*. Until his death in 1981, William Loeb was the president and principal stockholder of the Union Leader Corporation. Bergeron's complaint alleges that he and other employees of the Union Leader Corporation entered into an agreement with Loeb during Loeb's lifetime whereby Loeb promised to transfer his stock in the Corporation to them upon his death. According to the complaint, Loeb breached this agreement by making an *inter vivos* transfer of his stock in the Corporation to the William Loeb Union Leader trust, which will not terminate until the deaths of the acting trustee, Loeb's widow Nackey S. Loeb, and her nine named successors. Bergeron alleges that, in further violation of the agreement, when the stock is eventually distributed on termination of the trust, it will go to those who are then employed by the Union Leader Corporation, and not to those employed by the Corporation as of the date of Loeb's death.

William Loeb died on September 13, 1981. Both his estate and the trust which holds the disputed stock are being administered in the Second Judicial District Court for the State of Nevada, in and for the County of Washoe. In accordance with Nevada law, Bergeron filed a general claim against Loeb's

estate in the Nevada court on March 17, 1982.[1] Loeb's widow and executrix, Nackey S. Loeb, filed a rejection of Bergeron's claim in the Nevada court on April 5, 1982, and a copy of the rejection and notice of rejection was sent to Bergeron by certified mail.

On June 7, 1982, Bergeron instituted a class action "for himself . . . and on behalf of the entire class of Union Leader Corporation employees similarly situated" in the United States District Court for the District of New Hampshire. The named defendants in Bergeron's federal action were the estate of William Loeb, the William Loeb Union Leader trust, Nackey S. Loeb in her capacity as both executrix of Loeb's estate and acting trustee of the Union Leader trust, and the Security National Bank of Nevada, which allegedly holds a security interest in the trust. Bergeron's complaint sought declaratory and equitable relief, and alleged violations of the federal securities laws as well as breach of contract and fraud under New Hampshire law. Jurisdiction over Bergeron's state law claims was based on diversity of citizenship; according to Bergeron's complaint, defendant Nackey S. Loeb is a resident and domiciliary of Massachusetts, and defendant Security National Bank is located in Reno, Nevada.

On June 18, 1982, Nackey S. Loeb filed a declaratory judgment action in her capacity as executrix of Loeb's estate against Bergeron in the Nevada state district court under Nev. Rev. Stat. § 147.130(1) (1983), which provides in relevant part,

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[1] Nev. Rev. Stat. § 147.040(1) (1979) provides:

> All persons having claims against the deceased must, within 90 days after the first publication of the notice [of the appointment of an executor or administrator] file the same, with the necessary vouchers, with the clerk of the court, who shall file and register each claim.

> When a claim is rejected by the executor or administrator or the district judge, in whole or in part, the holder shall be immediately notified by the executor or administrator, and the holder must bring suit in the proper court against the executor or administrator within 60 days after such notice, whether the claim is due or not; otherwise the claim shall be forever barred. . . .

The executrix argued that Bergeron had failed to comply with section 147.130(1), because the federal district court in New Hampshire was not a "proper court" within the meaning of the statute. She also contended that, even if the federal district court was a "proper court," Bergeron's action was time-barred under section 147.130(1) because it was brought more than 60 days after she had filed a rejection of his claim.

Bergeron brought a motion to enjoin the executrix's Nevada action in the federal district court in New Hampshire, but the motion was denied. Thereafter, Bergeron filed an answer in the Nevada action and defended the executrix's suit on the merits. The Nevada state district court held for the executrix and, on appeal, its decision was affirmed by the Nevada Supreme Court.[2] *Bergeron* v. *Loeb*, 675 P.2d 397 (Nev. 1984) (per curiam). The Nevada Supreme Court denied Bergeron's petition for rehearing, and the United States Supreme Court subsequently denied his petition for a writ of certiorari. *Bergeron* v. *Loeb*, 105 S.Ct. 1182 (1985).

After the Nevada Supreme Court had ruled that Bergeron's claim against the Loeb estate was "forever barred" under Nev.

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[2] The Nevada state district court held both that the federal district court was not a "proper court" within the meaning of Nev. Rev. Stat. § 147.130(1) and that Bergeron's action was time-barred. On appeal, the Nevada Supreme Court affirmed the decision of the state district court on the former ground, but stated that Bergeron "had filed his claim within the requisite 60 day period." *Bergeron* v. *Loeb*, 675 P.2d at 399.

Rev. Stat. § 147.130(1), the defendants in Bergeron's action in the federal district court in New Hampshire moved in that case for dismissal of his state law claims and for summary judgment on his claim under the federal securities laws. On October 12, 1984, the federal district court in New Hampshire granted both of these motions. In this appeal, Bergeron argues that the federal district court erred in dismissing his state law claims, but does not contest the district court's award of summary judgment under the federal securities laws.

I.

Bergeron's first argument on appeal is that the federal district court in New Hampshire erred in according preclusive effect to the judgment of the Nevada Supreme Court, because the Nevada decision is repugnant to the federal Constitution. Specifically, Bergeron contends that the Nevada Supreme Court's interpretation of Nev. Rev. Stat. § 147.130(1) is not entitled to full faith and credit because it was "beyond [the Nevada court's] power" to deprive the federal district court in New Hampshire of jurisdiction over a claim that was not within the probate exception to federal diversity jurisdiction.[3]

We decline to consider this question because, in our view, the constitutionality *vel non* of the Nevada Supreme Court's judgment is res judicata, and must be accorded full faith and credit here. As the Supreme Court observed in *Allen* v. *McCurry*,

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[3] The probate exception to federal diversity jurisdiction is a common law limitation which holds simply that "a federal court has no jurisdiction to probate a will or administer an estate." *Markham* v. *Allen*, 326 U.S. 490, 494 (1946). The rationale for the probate exception is both historical and prudential. *See Dragan* v. *Miller*, 679 F.2d 712, 713-15 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982); Vestal & Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 Minn. L. Rev. 1, 13-23 (1956).

449 U.S. 90, 94 (1980), under the doctrine of res judicata "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."

The issue before the Nevada Supreme Court was whether the federal district court in New Hampshire was, for the purposes of Nev. Rev. Stat. § 147.130(1), a "proper court" in which to bring an action against the Nevada executrix. *Bergeron* v. *Loeb*, 675 P.2d at 399. The Nevada Supreme Court concluded that it was not. Regardless of whether Bergeron adequately raised the question of the constitutionality of this interpretation in the Nevada courts, it is clear that he could have.[4] Moreover, it is beyond doubt that the Nevada judgment is a final judgment; not only has the Nevada Supreme Court rendered a decision on the merits, but the United States Supreme Court has denied Bergeron's petition for a writ of certiorari. *See Diaz-Buxo* v. *Trias Monge*, 593 F.2d 153, 157 (1st Cir.), *cert. denied*, 444 U.S. 833 (1979).

Res judicata would preclude review here even if we believed that the Nevada Supreme Court's decision was unconstitutional on its face. It has been said that "res judicata renders white that which is black, and straight that which is crooked." *Jeter* v. *Hewitt*, 63 U.S. (22 How.) 352, 364 (1859). In the federal system, federal courts are required by the full faith and credit statute, 28 U.S.C. § 1738 (1982), to give the same res judicata effect to final judgments rendered in state courts that they would be entitled to in the forum in which they were rendered.

In the leading case of *Milliken* v. *Meyer*, 311 U.S. 457 (1940), the Supreme Court reviewed a decision of the Colorado Supreme Court which refused to accord full faith and credit to the decision of a Wyoming court on the grounds that "the

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[4] Bergeron raised the constitutional issue in his brief submitted to the Nevada Supreme Court, but it is not clear from the record whether he raised this issue any earlier in the Nevada proceedings.

Wyoming decree was void on its face because of an irreconcilable contradiction between the findings and the decree." 311 U.S. at 461. The Supreme Court reversed, writing,

> Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is of course open to inquiry . . . . But if the judgment on its face appears to be a "record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself." . . . In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. . . . Whatever mistakes of law may underlie the judgment . . . it is "conclusive as to all the *media concludendi*."

311 U.S. at 462 (citations omitted). The reasoning expressed in *Milliken* is equally applicable where, as here, a state court's judgment is challenged in a federal court. 18 U.S.C. § 1738 (1982); *Allen* v. *McCurry*, 449 U.S. at 95-96.

In an apparent attempt to evade the rule of *Milliken*, Bergeron argues that "it was beyond the power" of the Nevada Supreme Court to interpret the Nevada statute as it did. However, Bergeron does not argue that the Nevada courts lacked jurisdiction over the parties, and it cannot seriously be contended that the Supreme Court of Nevada lacked jurisdiction to interpret a Nevada statute or assess its validity under the federal Constitution. *Webb* v. *Webb*, 451 U.S. 493, 499 (1981). Accordingly, we sustain the district court's dismissal of Bergeron's state laws

claims against Loeb's estate and Nackey S. Loeb in her capacity as executrix.

II.

The above holding does not conclude matters, however, for we must also consider whether the federal district court erred in dismissing Bergeron's claims against the William Loeb Union Leader trust, Nackey S. Loeb in her capacity as trustee, and the Security National Bank of Nevada, which allegedly holds a security interest in the trust. The federal district court did not say whether it was dismissing these claims on the grounds of res judicata (*i.e.*, because of the preclusive effect of the Nevada Supreme Court's judgment), or the principles relating to the conservation of judicial resources described in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), or the abstention doctrine set forth in *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). All three of these theories were alluded to in the district court's explanation. Accordingly, we shall deal with each of these grounds in turn.

A. *Res Judicata*

We do not believe that the judgment of the Nevada Supreme Court had a preclusive effect on Bergeron's claims against the Union Leader trust, the trustee, and the bank in the federal district court in New Hampshire. The Nevada declaratory action was brought by Nackey S. Loeb acting in her capacity as executrix of Loeb's estate, not in her other capacity as trustee of the Union Leader trust. The Nevada state district court, whose declaratory judgment was reviewed by the Nevada Supreme Court, held simply that Bergeron's claim against the executrix and Loeb's estate was forever barred under Nev. Rev.

Stat. § 147.130(1). At the beginning of the Nevada Supreme Court's opinion, the court stated that the "sole issue" before it was whether Bergeron's claim against the estate was barred with prejudice under section 147.130(1). *Bergeron* v. *Loeb*, 675 P.2d at 399. To be sure, the Nevada Supreme Court later adverted at length in its opinion to the William Loeb Union Leader trust, stating,

> In the instant case, the assets of the Loeb estate, in which appellant claims an interest, have been and remain under the jurisdiction of the Nevada district court. In addition, the trust, upon which appellant seeks to impose an equitable claim, was established and is being administered under the auspices of this same court. The assets of this trust are some 3,750 shares of Union Leader Corporation stock, registered in the name of William Loeb, the decedent. The legal situs of these shares is Nevada, where the stock certificates are located and the trust is being administered. Certificates of stock are the physical representation of the stock and the court's possession of the certificates gives jurisdiction over the stock. The situs of the shares is the situs of the certificates. *Haughey* v. *Haughey*, 305 Mich. 356, 9 N.W.2d 575 (1943). *Accord, In re De Lano's Estate*, 181 Kan. 729, 315 P.2d 611 (1957). This administration of the decedent's estate and trust is in conformity with NRS 136.010 which gives exclusive jurisdiction of the settlement of estates to the district court of the county in which the deceased was a resident at the time of death. Appellant's action in federal district court in New Hampshire essentially petitions that court to determine the ownership of the trust res which is under the jurisdiction of the Nevada district court.

Bergeron v. *Loeb*, 675 P.2d at 401. Whatever the truth of the above language, however, the fact remains that neither the trust, the trustee, nor the bank were parties to the Nevada declaratory action, and the merits of Bergeron's claims against these parties were not before the Nevada court.[5] It follows that any view the Nevada Supreme Court expressed or implied as to Bergeron's claims has no res judicata effect here. *See Stein* v. *Mutuel Clerks' Guild of Massachusetts, In.*, 560 F.2d 486, 490 (1st Cir. 1977); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4406 (1981).

The William Loeb Union Leader trust is an *inter vivos* trust that was funded with Loeb's shares of stock in the Union Leader Corporation prior to his death. As far as we can tell, the trust assets have never passed through Loeb's estate.[6] In these circumstances, we see no basis to conclude that the Nevada Supreme Court's judgment barred Bergeron's federal court claims in New Hampshire against the Union Leader trust, the trustee, and the bank.

One of Bergeron's claims against the trust in his New Hampshire federal court suit is based on the theory that there was a fraudulent conveyance of Union Leader Corporation stock to the trust during Loeb's lifetime. The relief sought by Bergeron includes a declaration that the stock is subject to a construc-

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[5] On July 13, 1982, soon after Bergeron instituted suit in the federal district court in New Hampshire, Nackey S. Loeb procured a decree from the state district court in Nevada confirming her appointment as trustee of the William Loeb Union Leader trust. The Nevada decree stated, "This court has and shall have jurisdiction of the Trust as a proceeding in rem under Section 164.010(1) Nevada Revised Statutes." This ex parte decree was *not* related to the declaratory action brought by Nackey S. Loeb in the Nevada state district court in her capacity as executrix and ultimately appealed to the Nevada Supreme Court.

[6] Indeed, in their motion for summary judgment filed in the federal district court, the defendants averred that "[t]he Union Leader stock is an asset of the Estate of William Loeb for federal estate tax purposes only," and is otherwise "an asset of the William Loeb Union Leader Trust."

tive trust in favor of Bergeron and other Union Leader employees. At least one state has upheld the right of a plaintiff to sue to impose a constructive trust upon personalty transferred to an innocent third party without joinder of the representative of the decedent who committed the alleged fraud. *Simonds* v. *Simonds*, 58 A.D.2d 305, 396 N.Y.S.2d 547 (App. Div. 1977), *aff'd*, 45 N.Y.2d 233, 408 N.Y.S.2d 369, 380 N.E.2d 189 (1978); *see also Restatement of Restitution* § 168 (1937); 5 A. Scott,, *The Law of Trusts* § 470, at 3444-45 (1967). Thus, without expressing any view as to the merits of Bergeron's claim, and without foreclosing the possibility that under New Hampshire or other applicable state law a different result may obtain, we think it has yet to be demonstrated that Bergeron lacks a legitimate basis for proceeding in the federal district of New Hampshire against the trust, the trustee, and the bank, notwithstanding the fact that he is permanently barred, as a result of the Nevada judgment, from obtaining relief against the estate.

B. *The* Colorado River *Factors*

As an alternative ground for its holding that the dismissal of Bergeron's state law claims was warranted, the district court invoked the principles set forth in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) and recently reaffirmed in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983). In *Colorado River*, the Supreme Court identified several factors that counsel in favor of dismissal in situations involving the exercise of concurrent jurisdiction by federal or federal and state courts, and promote the public interest in " '[w]ise judicial administration, . . . conservation of judicial resources and comprehensive disposition of litigation.' " 424 U.S. at 817 (*quoting Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952).)

These factors include (1) which court first assumed jurisdiction over any res or property involved in the action; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; and (5) whether federal law supplies the rule of decision. *Moses H. Cone*, 460 U.S. at 13-26. In promulgating this test, the Supreme Court cautioned that federal courts have a "virtually unflagging obligation to exercise the jurisdiction given them," and that "[o]nly the clearest of justifications will warrant dismissal." *Colorado River*, 424 U.S. at 817, 819.[7]

On appeal, Bergeron argues that the federal district court in New Hampshire erred in concluding that the *Colorado River* factors counseled in favor of dismissal of his state law claims against the trust, the trustee and the bank. We agree. We need not address Bergeron's argument to the extent that it relates to his claims against Loeb's estate and the executrix, because we have already determined that the Nevada Supreme Court's decision precluded these claims.

Considering the *Colorado River* factors in turn, we do not think that the Nevada state district court's assumption of in rem jurisdiction over the trust res compels dismissal here.[8] In

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[7] In *Colorado River*, 424 U.S. at 813-17, the Court distinguished this test from the three branches of the abstention doctrine, which concern (1) cases which present difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar, *see,, e.g., Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943) (discussed *infra*); (2) cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law, *see, e.g., Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941); and (3) cases where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, *see, e.g., Younger* v. *Harris*, 401 U.S. 37 (1971). The latter two branches of the abstention doctrine have no application to the case at bar.

[8] *See* note 5, *supra*.

Princess Lida v. *Thompson*, 305 U.S. 456 (1939), the Supreme Court considered whether a federal district court could properly exercise concurrent jurisdiction over a suit involving the administration and control of a trust res that was already within the exclusive jurisdiction of the Pennsylvania Court of Common Pleas. In determining that the federal district court was without jurisdiction to hear the suit, the *Princess Lida* Court wrote,

> Certain it is . . . that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other. We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of similar nature where, to give effect to its jurisdiction, the court must control the property. The doctrine is necessary to the har-

> monious cooperation of federal and state tribunals. While it has no application to a case in a federal court based upon diversity of citizenship, wherein the plaintiff seeks merely an adjudication of his right or his interest as a basis of a claim against a fund in the possession of a state court, this is not such a case. No question is presented in the federal court as to the right of any person to participate in the res or as to the quantum of his interest in it. The contentions are solely as to administration and restoration of corpus.

305 U.S. at 465-67 (footnotes omitted). *See also Kittredge* v. *Stevens*, 126 F.2d 263 (1st Cir.), *cert. denied*, 317 U.S. 642 (1942). Here, in contrast to the situation in *Princess Lida*, Bergeron's claims against the trust appear to be unrelated to the administration of the trust corpus. Instead, he "seeks merely an adjudication of his right or his interest as a basis of a claims against a fund in the possession of a state court." *Princess Lida*, 305 U.S. at 466. Therefore, the fact that the Nevada state district court in an ex parte order has asserted in rem jurisdiction over the trust res, *see* note 5, *supra*, does not warrant dismissal of Bergeron's claims that a constructive trust should be imposed on the res in his favor. *See FSLIC* v. *Krueger*, 435 F.2d 633, 636-37 (7th Cir. 1970).

Consideration of the remaining *Colorado River* factors does not alter this conclusion. The adjudication of Bergeron's claims to the trust corpus will not necessarily be more inconvenient in New Hampshire than it would in Nevada. Bergeron is a New Hampshire resident, the *Manchester Union Leader* is published in New Hampshire, and Bergeron's complaint alleges actions which occurred in New Hampshire in purported violation of New Hampshire law. There does not appear to be

any threat of piecemeal litigation here. Not only are Bergeron's claims unrelated to the administration of the trust, but there is nothing in the record to suggest that the trust is the subject of any litigation whatever in the Nevada courts. *Compare Heritage Land Co.* v. *FDIC*, 572 F. Supp. 1265, 1267 (W.D. Okla. 1983) (Defendant's motion to dismiss granted where plaintiff sought refuge in federal court only "after it had flailed about in state court for months and as it was facing imminent judgment."). Similarly, since Bergeron's federal action is not in rem, it is of little consequence that the Nevada court may have assumed jurisdiction of the trust res before Bergeron initiated the federal action in New Hampshire. Although Bergeron's complaint does not state a federal claim, it is clear that this factor alone does not justify the surrender of a federal court's diversity jurisdiction. *Moses H. Cone*, 460 U.S. at 23-26.

C. *The* Burford *Abstention Doctrine*

In dismissing Bergeron's state law claims, the federal district court in New Hampshire also alluded to the abstention doctrine set forth in *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). In *Burford*, the Supreme Court reviewed the propriety of a district court's dismissal of an action to enjoin the execution of an order of the Texas Railroad Commission relating to the drilling and operation of certain oil wells. The Supreme Court affirmed the district court's dismissal of the action, writing,

> The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success

> of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. . . . Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

319 U.S. at 333-34 (citation omitted).

In our view, the *Burford* abstention doctrine has no application to Bergeron's claims against the William Loeb Union Leader trust. *Burford* has principally been invoked in cases where the assumption of federal jurisdiction threatens to disrupt the orderly administration of state regulatory schemes, or where the plaintiff in a diversity action seeks to restrain the exercise of authority vested in state officers. *See Allstate Insurance Co.* v. *Sabbagh*, 603 F.2d 228 (1st Cir. 1979); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4244, at 485 (1978). Neither of these situations is present in the case at bar. Furthermore, we cannot say that the federal district court's determination of Bergeron's rights to the assets of the William Loeb Union Leader trust "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River*, 424 U.S. at 814. Last, although Bergeron's claims may present difficult or unresolved questions of state law, we have recognized that this complication, without more, does not warrant abstention where the plaintiff has properly invoked the diversity jurisdiction of the federal district court. *Construction Aggregates Corp.* v. *Rivera de Vicenty*, 573 F.2d 86, 91 (1st Cir. 1978).

III.

We briefly address, in conclusion, Bergeron's argument that the district court's dismissal of his state law claims against the estate and the trust somehow deprived him of his right to a federal forum, contrary to the rule laid down in *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). *England* is inapposite, however, for in *England* the Supreme Court disapproved of the use of the abstention doctrine to deprive a litigant of his right to assert federal claims in a federal court. Here, Bergeron does not dispute the fact that the only colorable claims which he has asserted against the defendants arise under state law. *See Construction Aggregates Corp.* v. *Rivera de Vicenty*, 573 F.2d 86, 92 (1st Cir. 1978).

IV.

The judgment of the district court is affirmed in respect to the dismissal of Bergeron's claims against Loeb's estate and Nackey S. Loeb in her capacity as executrix.

The judgment of the district court is vacated in respect to its dismissal of Bergeron's claims against the William Loeb Union Leader trust, Nackey S. Loeb in her capacity as trustee, and the Security National Bank of Nevada, and these matters are remanded for further proceedings in the district court. On remand, the district court may wish to consider, *inter alia*, (1) what state's law governs the disposition of these claims; and (2) whether and to what extent, if any, Bergeron can properly proceed with these claims now that Loeb's estate and Nackey S. Loeb in her capacity as executrix are no longer parties to the federal action. We of course express no view on the ultimate merits of the remanded claims.

Affirmed in part, vacated in part, and remanded.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1374

In The
Supreme Court of the United States
October Term, 1985

THE ESTATE OF WILLIAM LOEB,
THE WILLIAM LOEB
UNION LEADER TRUST, NACKEY S. LOEB
(Individually, as Executrix of the Estate
of William Loeb, and as Trustee
of the William Loeb Union Leader Trust),
AND THE SECURITY BANK OF NEVADA,

Petitioners,

vs.

RICHARD R. BERGERON,

Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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27 pp

QUESTIONS PRESENTED FOR REVIEW

Respondent believes that petitioners did not correctly state the second issue before this Court. Petitioners' second issue characterizes the plaintiff's claim in the United States District Court for the District of New Hampshire as in rem in character. That claim was one for declaratory and equitable relief and the petitioners' statement of the issue as involving an in rem proceeding is misleading. Respondent believes the questions presented are:

1. Whether the issue presented by this case is of sufficient importance to warrant review by this Court.

2. Whether the Full Faith and Credit Clause of the United States Constitution requires dismissal of federal court claims not involving parties, or their privies, to an earlier state court action.

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No. 85-1374

In The

Supreme Court of the United States

October Term, 1985

THE ESTATE OF WILLIAM LOEB,
THE WILLIAM LOEB
UNION LEADER TRUST, NACKEY S. LOEB
(Individually, as Executrix of the Estate
of William Loeb, and as Trustee
of the William Loeb Union Leader Trust),
AND THE SECURITY BANK OF NEVADA,

Petitioners,

vs.

RICHARD R. BERGERON,

Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Richard R. Bergeron,
respectfully prays that the Petition
For Certiorari be denied.

OPINIONS BELOW

Respondent wishes to add the following opinion to those cited by the petitioners:

February 12, 1986: Order, United States District Court for the District of New Hampshire—Respondent's Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

In addition to those statutory provisions cited by petitioners, respondent wishes to cite the following:

Nevada Revised Statutes:

> 147.130. Rejection of claim; notice; time to file suit; service of summons; removal of executor or administrator for default.
>
> 1. When a claim is rejected by the executor or administrator or the district judge, in whole or in part, the holder must be immediately notified by the executor or administrator, and the holder must bring suit in the proper court against the executor or administrator within 60 days after such notice whether the claim is due or not; otherwise the claim is forever barred. If the holder of a claim resides out of the county, he may be informed of the rejection of his claim by written notice forwarded to his post office address by registered or certified mail.

STATEMENT OF THE CASE

Respondent believes it is necessary to provide some additional information regarding the petitioners' statement of the case. The plaintiff first filed his creditor's claim against the estate of William Loeb with the executrix of the estate on March 16, 1982. (*See* Petitioner's Appendix A). After the executrix, Nackey Loeb, denied the claim, (*See* Appendix A), plaintiff sought to pursue that claim in the federal district court in the State of New Hampshire, believing that court to be a proper court in which to bring such a claim under NRS 140.130. That statute provides that creditor's claims against an estate, once denied by the executrix, must be brought in the "proper court" within sixty (60) days of notice of such denial. The complaint filed in New Hampshire, however, involved much more than the plaintiff's claims against the estate. The plaintiff's complaint stated claims sounding in contract, tort and fraud and were brought against the estate, Nackey Loeb as executrix, the William Loeb Union Leader Trust, Nackey Loeb as trustee and the Security Bank of Nevada, seeking declaratory and equitable relief regarding shares of the Union Leader corporation held by the William Loeb Union Leader Trust. (*See* Petitioners' Appendix B). Subsequent to the bringing of plaintiff's complaint in federal court, Nackey Loeb, in her capacity as executrix of the estate, brought a declaratory judgment action in Nevada state court. That action sought to have the court declare that the plaintiff's claims against the estate were forever barred because they were not brought in the proper court within sixty (60) days of the denial of the plaintiff's claim by the executrix, as required by Nevada law. (*See* Petitioners' Appendix D).

Petitioner Nackey Loeb's request for a declaratory judgment was granted by the Nevada Court and the plaintiff appealed that decision to the Nevada Supreme Court, arguing that the federal court in New Hampshire was a proper court in which to bring his claims against the estate pursuant to Nevada law (*See* Petitioners' Appendix J, at 56a).

The Nevada Supreme Court affirmed the decision, holding that the plaintiff's claims against the estate were forever barred. The Nevada Supreme Court stated in its decision that "The sole issue addressed is whether the district court erred in interpreting NRS 147.130(1) as barring with prejudice the appellant's claim against the estate." (*See* Petitioners' Appendix J, at 55a-56a).

The petitioners then sought to plead this decision as a bar to all of the plaintiff's claims in federal court in New Hampshire, an argument accepted by the New Hampshire District Court. (*See* Petitioners' Appendix N). This decision was affirmed by the First Circuit Court of Appeals only as it related to the estate of the executrix and was reversed as to the other parties to the federal action. The Circuit Court held:

> [T]he fact remains that neither the trust, the trustee, nor the bank were parties to the Nevada declaratory action, and the merits of Bergeron's claims against these parties were not before the Nevada Court. It follows that any view the Nevada Supreme Court expressed or implied as to Bergeron's claims has no res judicata effect here.

(*See* Petitioners' Appendix R, at 89a) (citations omitted).

The petitioners now seek a writ of certiorari regarding the Circuit Court's opinion.

ARGUMENT

Petitioners ask this Court to grant a writ of certiorari. Their brief, however, fails to address why certiorari should be granted. In fact the arguments raised by the petitioners do not rise to the level of importance required for the granting of a writ of certiorari pursuant to the rules of this Court. This case lacks the issues of constitutional, legal or public significance for the granting of certiorari.

I. Petitioners Have Not Provided Any Special or Important Reasons For Granting a Writ of Certiorari.

The Rules of the Supreme Court of the United States provide that: "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Sup. Ct. R. 17.1. Thus, a writ of certiorari may be granted when a federal court of appeals hands down a decision conflicting with the decision of another federal court of appeals on the same issue, or decides a federal question such that its decision conflicts with a state court of last resort, or when a federal court of appeals has decided an important question of federal law which should be settled by the Supreme Court. *Id.* at 17.1 (a) and (c). In any case, however, the petition for writ of certiorari must contain "A direct and concise argument amplifying the reasons relied on for the allowance of the writ." *Id.* at 21.1 (j).

This Court has read the above rules to require that the issues presented be "beyond the academic or the epi-

sodic." *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955). Cases considered should be important "to the public, as distinguished from that of the parties and in cases where there is a real and embarassing conflict of opinion and authority between the Circuit Courts of Appeals." *Id.* at 79, *citing Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387 (1923). The petition for writ of certiorari in this case simply fails to meet any of these requirements.

The petitioners' brief argues that this Court should consider whether the First Circuit Court of Appeals erred in its application of the doctrines of res judicata and abstention. Nowhere, however, do the petitioners present any reason or basis for this Court to grant a writ of certiorari. The petitioners' brief does not contain any "direct and concise" argument expanding upon the reasons for allowing the writ. We assume this is so because none exists. The decision of the First Circuit in this matter did not conflict with any decision of another federal circuit court on the same issues, nor did it decide a federal question in such a way as to conflict with the decision of a state court of last resort. (*See* Petitioners' Appendix R). Plainly. the issues raised by the petitioners are issues important to only the petitioners. This case does not involve any issues important to the public and the writ of certiorari should not be granted.

II. The Decision of the Circuit Court Gave Full Faith and Credit to the Decision of the Nevada Supreme Court.

One of the questions presented by the petitioners' petition is whether the First Circuit's application of the doctrine of res judicata gave full faith and credit to an

earlier decision of the Nevada Supreme Court involving a declaratory judgment action brought by the petitioner, Nackey Loeb, as executrix of the estate of William Loeb. The doctrine of res judicata provides that a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *Parklane Hosiery Co. v. Shore,* 429 U.S. 322, 327 n.5 (1979) *citing* 1B J. Moore, Moore's Federal Practice para. 0.405[1] (2d ed. 1984). The Constitutional requirement of full faith and credit, U.S. Const. art. IV, § 1, is closely associated with the doctrine of res judicata such that a judgment that is res judicata in the jurisdiction which entered it is res judicata in all courts. *See, Kremer v. Chemical Const. Corp.,* 456 U.S. 461 (1982). The res judicata effect of a judgment, however, is limited to the parties to an action and their privies. In this action, the judgment asserted as having res judicata effect involved only Bergeron and the petitioner, Nackey Loeb, as executrix for the estate of William Loeb. Not one of the other parties before this Court today was involved. To understand the absurdity of petitioners' argument that the Nevada decision should be given full faith and credit as to all parties before this Court, it is necessary to review the procedural history of this case.

Nevada Revised Statutes 147.040 requires that those having claims against an estate must file their claims within ninety (90) days of notice of the executor's or executrix's appointment. NRS 147.040. The plaintiff, Richard Bergeron complied with this statute (*See* Petitioners' Appendix A), and his claim was denied by the petitioner, Nackey Loeb, as executrix of the estate of William Loeb. (*See* Respondent's Appendix A). Pursuant to NRS 147.

130(1), the plaintiff was required to bring suit in "the proper court against the executor or administrator within sixty (60) days after such notice [of rejection] . . . otherwise the claim shall be forever barred." NRS 147.130(1).

The plaintiff, taking the New Hampshire Federal District Court to be a "proper court" under the statute, brought his claims in that court. (*See* Complaint Filed in United States District Court for the District of New Hampshire, Petitioners' Appendix B). The claims brought in the District Court, however, involved more than a claim against the estate of William Loeb. Bergeron's claims sounded in contract, tort and fraud, and sought, in addition to other relief, the imposition of a constructive trust on the Union Leader stock Loeb, during his lifetime, had transferred into trust and out of his employee's reach. (*See* Petitioners' Appendix B). Therefore, the action brought in federal court named not only the estate of William Loeb and its executrix as defendants, but also named the William Loeb Union Leader Trust, its trustee and the Security Bank of Nevada as defendants.

After plaintiff brought these claims, the petitioner, Nackey Loeb acting *only* as executrix of the estate, brought a declaratory judgment action in Nevada requesting that the court declare that the plaintiff's claims were forever barred because his claims were not filed in the proper court within the sixty day limitation of NRS 147.130(1), the proper court being the Second Judicial District Court of Washoe County, Nevada. (*See* Petitioners' Appendix C). The request for declaratory judgment was granted and that decision was appealed to the Nevada Supreme Court. At the beginning of its decision affirming the Washoe County District Court's

holding that Bergeron's claims were forever barred, the Nevada Supreme Court stated: "The sole issue addressed is whether the District Court erred in interpreting NRS 147.130(1) as barring with prejudice appellant's claim against the estate." (*See* Petitioners' Appendix J). Bergeron's appearance in that action, as the decision of the Nevada Supreme Court recognizes, was solely to argue that his claims against the *estate* of William Loeb had been brought in the "proper court" under the Nevada statute. (*See* Petitioners' Appendix J, at 56a).

Upon the entry of the ruling that plaintiff's claims against the estate were barred, the petitioners sought to dismiss the action in the federal court in New Hampshire based on the doctrines of res judicata and abstention, a request which was granted by the court. (*See* Petitioners' Appendix N). That decision was reversed in part by the First Circuit Court of Appeals. The Circuit Court held that the doctrines of res judicata and abstention do not apply to bar suit against the William Loeb Union Leader Trust, its trustee and the Security National Bank of Nevada. (*See* Petitioners' Appendix R). Petitioners now seek to resurrect their arguments and the decision of the New Hampshire District Court before this Court. These efforts simply must fail.

The declaratory judgment action brought in Nevada was brought by Nackey Loeb as executrix for the estate of William Loeb and in no other capacity. The only issue decided was whether Bergeron's claim against the estate was forever barred under Nevada law. The merits of the plaintiff's claims against the trust, the trustee and the bank were never raised or considered because they

were not parties to the action. Thus, the decision can have no res judicata effect as to the plaintiff's claims against those parties in federal court. *See, Stein v. Mutual Clerk's Guild of Mass., Inc.,* 560 F. 2d 486, 490 (1st Cir. 1977).

The fallacy of the petitioners' arguments rests in the assertion that the plaintiff's complaint filed in federal court in New Hampshire is the same claim as that asserted against the Loeb Estate in Nevada. The plaintiff's claims in Nevada, however, were confined to the filing of a claim with the executrix, Nackey Loeb. Bergeron's New Hampshire action went much further, embracing claims against the estate, the executrix, the trust, the trustee, and the Security Bank of Nevada. These claims principally called for equitable relief. Although the complaint included the claims against the estate which the plaintiff sought to pursue under Nevada law, the complaint also encompassed all of the claims Bergeron had against the estate and the executrix, as well as the trust, the trustee and the bank. The scope of the Nevada proceedings was far more limited than the scope of the proceedings in the New Hampshire District Court. Moreover, only the estate, the executrix and Bergeron were parties to the Nevada action. This fact becomes important in light of Nackey Loeb's status as executrix of the estate and as trustee of the William Loeb Union Leader Trust. Since the declaratory judgment action in Nevada was commenced by Nackey Loeb *only* as executrix of the estate, one must assume that the interests of the trust were not at stake in the proceedings. Therefore, that decision can be given res judicata effect only as to the executrix and the estate of William Loeb.

For the same reason, the plaintiff's claims are not moot. A real controversy exists between Bergeron and the trust, the trustee and the bank. This controversy is in no way diminshed by the absence of the executrix and the estate as parties. In fact, the New Hampshire District Court has ruled that the estate and the executrix are not indispensable parties in the plaintiff's action, and that the plaintiff can receive complete relief without either as parties to the action. (*See* Appendix B, at A-6).

The decision of the First Circuit Court of Appeals gave full faith and credit to the Nevada Supreme Court's decision. It called for the dismissal of the plaintiff's claims against the executrix and the estate. No broader application of the Nevada decision is warranted or justified and the petitioners' arguments must fail.

III. Abstention By the United States District Court for the District of New Hampshire was Properly Reversed by the First Circuit Court of Appeals.

Throughout this litigation, the petitioners have portrayed the instant suit as a proceeding in rem in nature. Thus, their arguments hold that since the Nevada Courts first acquired jurisdiction over the trust res, the New Hampshire federal court must abstain to prevent any interference with that jurisdiction. This argument ignores the nature of the action brought by plaintiff and misapplies the abstention doctrine.

Initially, this Court must recognize that the Nevada Court's exercise of jurisdiction over the trust res was not a part of the petitioners' declaratory judgment action. Instead, it was merely a confirmation of the appointment

of Nackey S. Loeb as the trustee of The William Loeb Union Leader Trust. (*See* Petitioners' Appendix D). This fact was recognized by the First Circuit. (*See* Petitioners' Appendix R, at 89a n.5). Moreover, the trust is an inter vivos trust whose assets have never passed through the Loeb estate. (*See id.* at 89a n.6). Ignoring these facts, the petitioners strain to argue that the New Hampshire federal court's abstention should be affirmed.

Bergeron's claims in New Hampshire sought declaratory relief, including a declaration of Bergeron's right to the assets of the trust and the imposition of a constructive trust. Such an exercise of jurisdiction does not require that the District Court abstain from the action. *See, Federal Savings and Loan Insurance Corporation v. Krueger,* 435 F. 2d 633 (7th Cir. 1980). Thus, the principle stated in *Princess Lida v. Thompson,* 305 U.S. 456 (1939), requiring that when two courts attempt to exercise in rem jurisdiction over the same property, jurisdiction in one court should yield to the court first exercising jurisdiction over the res, does not apply if "the plaintiff seeks merely an adjudication of his right or his interest as a basis of a claim against a fund in possession of a state court . . . ." *Id.* at 466.

Beyond any argument regarding jurisdiction over the res at issue, the petitioners ignore this Court's holding that abstention is an extraordinary exercise of federal restraint designed to maintain our federalism in exceptional circumstances. *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1 (1983). None of the factors required for abstention under *Colorado River Water Conservation District v. United States,* 424

U.S. 800 (1976), or *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), are present in this action.

The *Colorado River* abstention doctrine requires that a court find a clear justification for abstention by considering the following factors: 1) which court first assumed jurisdiction over the property; 2) the avoidance of piecemeal adjudication; 3) the order in which jurisdiction was obtained; and 4) the convenience of the federal forum. *Colorado River, supra,* at 816-20. This is not a mechanical checklist, but a list of factors to be balanced in each case. *Moses H. Cone, supra,* at 17. The first factor, jurisdiction over the property, should be considered with the third factor, that being the order in which jurisdiction was obtained. The plaintiff brought this action in federal court on June 7, 1982. It was not until July 13, 1982, after the petitioner, in reaction to this suit, had brought her petition for declaratory judgment, that the Nevada Court held it had jurisdiction over the William Loeb Union Leader Trust and the shares of stock held by that trust. Thus, the New Hampshire federal court first obtained jurisdiction over the trustee, even if the Nevada court was the first to specifically find it had jurisdiction over the trust res. Since the plaintiff's complaint is an action in personam, it is the jurisdiction over the trustee and not the trust res which is determinative.

Concerning the fourth factor, the convenience of the federal forum, there can be no dispute that the New Hampshire Federal District Court is the most convenient forum for this action. The plaintiff resides in New Hampshire and the Manchester Union Leader is located in New Hampshire as well. In addition, the promises made by William Loeb which form the basis for this suit, were made

in New Hampshire to the New Hampshire employees of the Manchester Union Leader. Moreover, the New Hampshire United States District Court has jurisdiction over Nackey Loeb, the trustee of the William Loeb Union Leader Trust. There could not be a more convenient forum than that provided by the New Hampshire Federal District Court.

Lastly, the exercise of jurisdiction by the New Hampshire Federal District Court will not result in piecemeal adjudication. Petitioners' arguments that since the plaintiff's claim against the Loeb estate is barred, any declaration of rights regarding the trust will result in a piecemeal adjudication of rights, ignores those federal cases upholding the power of a federal court to declare the rights of a claimant to a trust even when in rem jurisdiction over the res exists in another state court proceeding. *See, Federal Savings and Loan Insurance Corp., supra,* at 636-37. Moreover, on remand from the First Circuit, the New Hampshire District Court has ruled that the law of New Hampshire applies to the claims in this action. (*See* Appendix B). Thus, the most appropriate court for the consideration of this action is the Federal District Court in New Hampshire.

The petitioners' reliance on *Burford* abstention is equally misplaced. The District Court and the petitioner attempt to apply *Burford* abstention because, they argue, the adjudication of Bergeron's claims will disrupt the efforts of Nevada's courts to establish a coherent policy regarding the administration of estates. Aside from the fact that the Loeb estate is no longer a party to this action and the assets of the trust are not, and have never been, part

of the estate, this argument must fail. The ability of federal courts to entertain suits to establish a creditor's claim against an estate has long been upheld. *See, Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909); *Hess v. Reynolds*, 113 U.S. 73 (1885); *Greyhound Lines v. Lexington State Bank & Trust Co.*, 604 F. 2d 1151 (8th Cir. 1979); *Monogram Industries, Inc. v. Zellen*, 467 F. Supp. 122 (D. Mass. 1979). Yet, petitioners seek to question such an exercise of jurisdiction in this case. Clearly, there is no justification for abstention in the present case.

CONCLUSION

The petitioners have failed to demonstrate or address the reasons for this Court to grant certiorari. Moreover, their arguments regarding the res judicata effect of the decision of the Nevada Supreme Court overlook the limited scope and effect of that proceeding regarding the parties to this action. Finally, the exercise of jurisdiction by the New Hampshire Federal District Court is both warranted and justified. The doctrine of abstention is an extraordinary exercise of discretion which should not be applied to Bergeron's claims.

Respectfully submitted,

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ON THE BRIEF:

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APPENDIX A

No. 81-10236
Dept. No. 9

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

In the Matter of the Estate

of

WILLIAM LOEB,

Deceased

NOTICE OF REJECTION OF CLAIM

To: RICHARD R. BERGERON
RFD 2, Danis Park Road,
Goffstown, New Hampshire 03045

NOTICE IS HEREBY GIVEN that your Claim, sworn to March 16, 1982, filed with the Clerk of the above-entitled court on March 17, 1982, was rejected as to the whole thereof, by the undersigned Executrix of the estate on March 29th, 1982, and the Rejection was filed with the Clerk of the above entitled court on April 5, 1982.

DATED, April 5, 1982.

/s/ Nancy S. Loeb
Executrix

APPENDIX B

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Richard R. Bergeron

v. #C82-317-L

Estate of William Loeb et al.

ORDER

After this court dismissed plaintiff's claim against all defendants, plaintiff appealed to the First Circuit Court of Appeals. *Bergeron* v. *Loeb,* No. 85-1340, slip. op. (1st Cir. November 25, 1985). The court affirmed the dismissal of Counts II-V against the defendants estate of William Loeb and Nackey Loeb as executrix. *Id.* at 21. The court vacated this court's dismissal of Counts II-IV against the trust, Nackey Loeb as trustee and the Security National Bank of Nevada. *Id.* Plaintiff did not appeal this court's award of summary judgment in favor of defendants on Count I, the federal securities claim. *Id.* at 6.

The First Circuit Court of Appeals remanded the case to this court with the suggestion that

> the district court may wish to consider, *inter alia,* (1) what state's law governs the disposition of these claims; and (2) whether and to what extent, if any, Bergeron can properly proceed with these claims now that Loeb's estate and Nackey S. Loeb in her capacity as executrix are no longer parties to the federal action.

Id. at 21.

I. *What state's law governs the disposition of this case?*

Plaintiff claims that the law of New Hampshire should apply to the present case; defendants claim Nevada law should apply. Defendants further contend that the present proceedings are *in rem* and the trust is under the jurisdiction of the Nevada district court.

In a diversity case, a federal district court must apply the choice of law rules of the forum state. *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941).

Under New Hampshire choice of law rules, the court must apply the law of the state with the most significant contact with the acts complained of by the plaintiff. *Diamond International Corp. v. Allstate Ins. Co.*, 712 F.2d 1498, 1501-02 (1st Cir. 1983); *Wise v. Kentucky Fried Chicken Corp.*, 555 F. Supp. 991, 994 (D.N.E. 1983); *Consolidated Mutual Ins. Co. v. Radio Foods Co.*, 108 N.H. 494, 496-97 (1968).

Plaintiff's action in the present case is not an *in rem* proceeding. As the Nevada Supreme Court acknowledged, the present case "essentially petitions [the New Hampshire] court to determine the ownership of the trust *res* which is under the jurisdiction of the Nevada district court." *Bergeron v. Loeb*, 675 P.2d 397, 401 (Nev. 1984) (per curiam)

This court finds that New Hampshire law is the applicable law in the disposition of the present case. Plaintiff's claims are for breach of contract and fraud. The acts complained of by plaintiff occurred in New Hampshire while plaintiff was an employee of the Union Leader, a New Hampshire newspaper, incorporated in New Hamp-

shire. It is clear that the state the most significant relationship to the acts complained of by plaintiff is New Hampshire.

Accordingly this court will apply the law of New Hampshire to the present action.

II. *Whether plaintiff can proceed in the present action against the estate of William Loeb and Nackey Loeb as executrix of the estate.*

Defendants claim that the plaintiff's case cannot proceed without the estate of William Loeb and the executrix as parties. Plaintiff claims that the estate and executrix are not necessary or indispensable parties under Fed. R. Civ. P. 19, and therefore he may proceed against the trust, the trsutee and the bank.

Rule 19 (a)-(b) of the Fed. R. Civ. P. provides:

> *(a) Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

> *(b) Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

The estate of William Loeb and the executrix are not necessary parties to the present action. The shares of stock in question were transferred to an *inter vivos* trust; they were only part of the estate for federal estate tax purposes. The First Circuit acknowledged that "[a]t least one state has upheld the right of a plaintiff to sue to impose a constructive trust upon personalty transferred to an innocent third party without joinder of the representative of the decedent who committed the alleged fraud." *Bergeron v. Loeb,* slip. op. at 13 (citing *Simonds v. Simonds,* 58 A.D.2d 305, 396 N.Y.S. 2d 547 (App. Div. 1977), *aff'd,* 45 N.Y. 2d 233, 408 N.Y.S. 2d 369, 380 N.E. 2d 189 (1978); Restatement of Restitution § 168 (1937); 5 A. Scott, *The Law of Trusts* § 470, at 3444-45 (1967)). New Hampshire law does not dictate a different result.

Although defendant cites *Estate of Wood,* 122 N.H. 956 (1982), that case is not dispositive of the present action. That case involved a testamentary trust where the

second wife waived the provisions of the will and sought her statutory share of the estate. The court had to decide whether New Hampshire or Massachusetts law applied.

There is no reason why the present case cannot proceed against the trust, the trustee and the bank. Complete relief can be accorded the parties since the assets in question are part of the inter vivos trust. The estate's absence will not impede its ability to protect any interest it may have. Further, even assuming the dismissed parties were necessary under Rule 19(a) they would not be indispensable under Rule 19(b). Plaintiff would have no other remedy if the case were dismissed for non-joinder since he may not maintain an action against the dismissed parties. Further, an adequate judgment may be rendered in the absence of the estate and executrix. Any prejudice which might conceivably exist can be lessened or avoided by the shaping of the relief granted by this court.

Accordingly, this court finds that the present action may proceed against the William Loeb Union Leader Trust, Nackey Loeb trustee and the Security National Bank of Nevada.

February 12, 1985

/s/ Martin F. Loughlin
U.S. District Judge

Alan P. Cleveland, Esq.
Michael Hanks, Esq.
Ralph Warren Sullivan, Esq.